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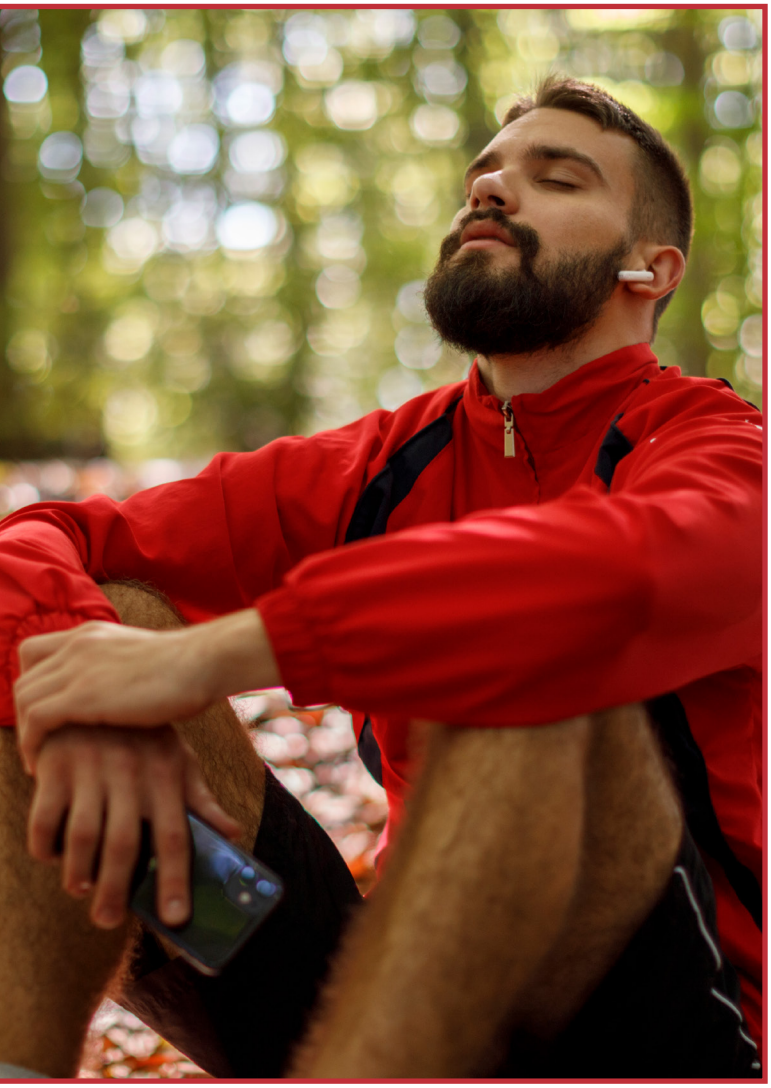

...a disconnect from work policy
...does not create any new rights
for employees

# *Working for Workers Act(s)* What Ontario Employers Need to Know

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Recently, the Government of Ontario introduced, and in some cases passed, several legislative changes to address issues in the modern workplace. These include disconnecting from work, electronic monitoring of employees, non-competition agreements in employment contracts, and specific requirements for employers in the gig economy. The two primary pieces of legislation introduced are Bill 27, the *Working for Workers Act, 2021* and Bill 88, the *Working for Workers Act, 2022*.

These amendments are addressed briefly in this article and more fully in our next *HReview* webinar to be held on June 8, 2022 (details on the back page of this newsletter).

## Bill 27

Bill 27 was given Royal Assent on December 2, 2021. The Bill amends the *Employment Standards Act, 2000* ("*ESA*") to require a disconnect from work policy and prohibit the use of a non-competition provision in an employment contract. Bill 27 also amends the *Occupational Health and Safety Act* ("*OHSA*") to require businesses to allow delivery persons to use the washroom at the place of delivery.

### *Disconnect from Work*

Bill 27 amended the *ESA* to require an employer with more than 25 employees to create a disconnect from work policy. The *ESA* defines "disconnecting from work" 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.*"

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The policy does not need to provide an employee the 'right' to disconnect from work or create any new entitlements for employees. However, an employer should ensure it complies with the existing hours of work, vacation and public holiday provisions of the *ESA*, all of which provide for time away from work.

***Non-Competition***

Bill 27 amended the *ESA* to prohibit an employer from entering into a "non-compete agreement", defined as "*an agreement... 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*".

This prohibition applies retroactively to October 25, 2021 but does not apply to a non-competition agreement entered into prior to October 25, 2021. A non-competition agreement entered into in violation of the *ESA* is void.

There are two exceptions. First, the prohibition does not apply if the agreement is with an "executive" (defined in the *ESA*). Second, the prohibition does not apply if, as part of a sale of a business (including a lease), or part of a business, the purchaser and seller agree the seller is prohibited from engaging in competitive activity after the sale and the seller becomes an employee of the purchaser immediately after the sale.

## Bill 88

At the time of writing, Bill 88 had received first reading. The key features of Bill 88 are the creation of the *Digital Platform Workers' Rights Act, 2022* which addresses standards for workers in certain gig economy jobs, amendments to the *ESA* to require an electronic monitoring policy, and amendments to the *OHSA* regarding naloxone kits and increasing fines and limitation periods.

***Digital Platform Workers' Rights Act, 2022***

The Act will define "digital platform work" as "*the provision of for payment rideshare, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform*".

The Act will provide digital platform workers with the right to:

- Information related to pay, work assignments and performance rating
- A recurring pay period and pay day
- Minimum wage for each work assignment
- Amounts earned by the worker and to tips and other gratuities
- Notice of removal from an operator's digital platform
- Resolve digital platform work-related disputes in Ontario
- Be free from reprisal

The Act also contains enforcement mechanisms and complaint procedures if there is an alleged breach.

***Electronic Monitoring***

Bill 88 will amend the *ESA* to require an employer with more than 25 employees to have a written policy regarding electronic monitoring of employees. This policy must describe how and in what circumstances the employer may electronically monitor employees and the purposes for which information obtained through electronic monitoring may be used by the employer.

***OHSA***

Bill 88 will amend the *OHSA* to require an employer to supply naloxone kits if the employer becomes aware there may be a risk of a worker having an opioid overdose at the workplace. Bill 88 also increases certain maximum fines and increases the limitation period for prosecution under the *OHSA* from one year to two years.

For additional insight into these legislative changes, please join us at our next *HReview* webinar on June 8, 2022 (details on the back page of this newsletter).

*To learn more and for assistance, contact the team at Sherrard Kuzz LLP.*

## DID YOU KNOW?

On March 10, Major League Baseball entered into a new collective bargaining agreement with the Players' Association. This ended a 99-day lockout, the 2nd longest work stoppage in MLB history, and the first work stoppage since a strike in 1994-1995 which resulted in the cancelation of the World Series.

# *Seasonal Employees – Risks and Best Practices*

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Spring is around the corner which means golf courses, landscaping companies, summer camps and other cyclical facilities are hiring seasonal employees. In most cases, a seasonal employee has the same employment-related rights as any other employee. However, in some ways, they can be treated differently. Here are a few common risks and best practices as we prepare for the warm weather season.

***Risk:*** **Violating human rights legislation in the hiring process.**

Human rights legislation prohibits discrimination in employment on the basis of several grounds which vary across Canada, but typically include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, gender identity, gender expression and disability (referred to as "protected grounds"). Even inadvertent or accidental discrimination is discrimination, so stay alert to these issues and proactively avoid them.

There are two basic exceptions which allow for discrimination based on an otherwise protected ground: (1) If a job requirement is a *bona fide occupational requirement* (*e.g.,* an ability to lift fifty pounds) and the individual's protected characteristic cannot be accommodated without imposing undue hardship on the employer; and (2) If the employee is under a certain age, as human rights legislation in many jurisdictions does not protect against age-related discrimination for those under a prescribed age (usually 18). Minimum wage also differs in most provinces if the employee is under a certain age.

***Best practice:*** **Be mindful about the language you use.**

Ensure the job description does not directly or indirectly discriminate based on a protected ground. An ad that seeks a "young, energetic female" may discriminate based on age, sex, gender and even disability. Similarly, an ad seeking a "strong man able to lift 100-pounds" may discriminate based on sex or gender, or even disability if heavy lifting is rarely required. The examples are endless.

When posting the position, and throughout the selection process, keep language neutral and tied directly to the *bona fide* requirements of the job. If lifting heavy weight is a bona fide requirement, say that, but without the extra narrative about "strong man", *etc.* And while you may be genuinely interested to learn about your potential new colleague, avoid questions like, "where's your accent from", "in your spare time, what do you do with your family", or even more direct, "are you married" or "do you have kids?".

Even if a decision not to hire a candidate is entirely unrelated to a protected ground, the fact the employer gathered this information may expose it to a claim. The most effective way to mitigate this risk at the hiring stage is to ask all candidates the same standardized questions, tied directly to the job requirements.

***Risk:*** **Assuming you have an inherent right to temporarily lay off an employee at the end of the season, or not recall them the following year, inadvertently exposing the organization to liability.**

Even experienced employers often use the terms "termination" and "layoff" interchangeably as if they mean the same thing. They don't. When an employee is terminated, the relationship between employee and employer ends. When an employee is laid off, the employer-employee relationship is suspended because there exists the possibility of a return to work.

Contrary to popular belief, in many provinces, an employer does not have an inherent right to temporarily lay off an employee at the end of a season without triggering termination entitlements. The fact that the business is closed for the season may not matter. For example, in Ontario, an employment contract must include an express or implied right to temporarily lay off an employee, failing which an employer has no automatic right to do so. Without this right, a layoff may amount to a without cause termination, entitling the employee to notice or pay in lieu of notice, and possibly severance pay.

An implied right to lay off may exist for some seasonal employers in certain provinces, but this is not guaranteed, and the cost to fight that battle (should you need to) could be high.

Even when an employer is permitted to temporarily lay off an employee, that layoff is deemed to be a termination once a certain period passes. The period varies from province to province and even within some provinces based on certain factors (*e.g.,* whether the employer continues benefits coverage during the layoff). In Ontario and British Columbia, the period can be as short as 13 weeks in any period of 20 consecutive weeks; and in Saskatchewan, the period can be as short as 7 days.

***Best practice:*** **Ensure all employees sign a properly worded, enforceable employment contract that: (1) includes an express right to lay off, and (2) limits termination entitlements to the statutory minimum.**

Without an enforceable employment contract, an employee is presumed to be owed common law notice on termination (regardless of whether the termination occurs immediately, at the end of a temporary layoff, or because the employee is not recalled the following season). Common law notice can amount to more than one month of notice or pay in lieu per year of service. For a long-standing employee, this can quickly add up to five or six-figures.

The only way to avoid common law entitlement is to agree with the employee to provide something less, so long as that something is not below the minimum statutory entitlement, which itself varies by province, but is typically one week per year of completed service to a maximum of 8 or 10 weeks. The difference between common law notice and the statutory minimum can therefore be considerable. A 15-year employee might be owed 15 months pay under the common law but only two months under statute. While it is best if an employee signs the employment contract before beginning work, with proper planning it is possible to do so during the employment relationship.

***Final word:*** **From the initial job posting, to the employment contract, to the end of the relationship (short or long-term), taking the time to do it right from the start will go a long way to protect your organization.** A template contract can often be used for multiple employees provided it is kept up-to-date with changes in the law. Making this small investment at the outset of the employment relationship will more than pay for itself in the long run.

*To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com.*

**HReview Seminar Series**

*Please join us at our next HReview Breakfast Seminar:*

# Working for Workers Act(s):

## What Employers Need to Know

Recently, the Government of Ontario introduced, and in some cases passed, several legislative changes to address issues in the modern workplace. The two primary pieces of legislation are Bill 27, the *Working for Workers Act, 2021* and Bill 88, the *Working for Workers Act, 2022*.

**Join us as we discuss:**

- **Disconnecting from Work:** what are employers required to do and when?
- **Non-Competition Agreements:** are they on life-support?
- ***Occupational Health and Safety Act*:** changes affecting employers.
- **The 'Gig' Economy:** the framework for wages and other work-related entitlements.
- **Electronic Monitoring:** what information is an employer required to give employees?

**DATE:** **June 8, 2022; 9:00 a.m. – 10:30 a.m.**
**WEBINAR:** **Via Zoom** (registrants will receive a link the day before the webinar)
**COST:** Complimentary
**REGISTER:** **Here by May 30, 2022**

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