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# Day 2

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**DENTONS' ONTARIO EMPLOYMENT  
AND LABOUR SPRING WEBINAR SERIES**

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# Your presenters



Matthew J. G. Curtis  
Partner  
D+1 416 367 6767  
matthew.curtis@dentons.com



Emily Kroboth  
Associate  
D+1 416 361 2378  
emily.kroboth@dentons.com



Karina Pylypczuk  
Associate  
D+1 416-862-3436  
karina.pylypczuk@dentons.com

# Agenda

- Are you ready for June 2, 2022? The latest on Ontario's Disconnect from Work law
- Ontario update on non-competes
- Working with the WSIB





# **Are you ready for June 2, 2022?**

**The latest on Ontario's Disconnect from Work law**

Emily Kroboth

# Is there really a “right” to disconnect?

- “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.”
- The legal requirement for a policy with respect to disconnecting from work is simply to have one. Currently there are no specific requirements for the content of these policies.
- There are currently no “prescribed” requirements – but this may change if and when the Ontario government releases regulations.
- Ultimately, there is no “right” to disconnect in Ontario.

# The basics

- Who needs this policy?
  - Employers with 25+ Ontario employees (across all locations) as of January 1<sup>st</sup>, 2022.
- When do Employers need this policy by?
  - June 2<sup>nd</sup>, 2022.
- Do employees need to receive a copy of the policy?
  - Yes. Employees must receive a copy of the policy within 30 days of its introduction at your workplace, and they must also receive any updates to the policy within 30 days.
- Can Employers have multiple policies for different employees?
  - Yes. Every employee must be covered by a “disconnecting from work” policy, but it does not have to be the same policy.
- Do Employers need to retain a copy of the “disconnecting from work” policy?
  - Yes. Employers must retain a copy of this policy for 3 years after the policy is no longer in effect.

# So what should your “Disconnecting from Work” policy contain?

- Employers currently have the flexibility to determine what their “right to disconnect” or their “disconnecting from work” policy should state.
- Some questions to consider, as you think about drafting your organization’s policy:
  - What are your organization’s priorities?
  - To what extent can you, or would you like to, allow your employees to disconnect from work?
  - Do you have employees working non-traditional working hours, for example, due to children learning from home during the pandemic?
  - Do you encourage managers to contact their team within standard working hours?
  - Could you leverage “disconnecting from work” as a retention strategy?

## Some take-aways

- Employers require a “disconnecting from work” policy by **June 2<sup>nd</sup>, 2022.**
- Further clarity on what the “right” to disconnect means may come if and when the Ontario government decides to release regulations.
- Although there is no “right” to disconnect, a disconnecting from work policy may help with employee burnout and retention.



# **Ontario update on non-competes**

Matthew Curtis

# Non-Competition Agreements

On November 30, 2021, the Ontario government passed the Working for Workers Act (“**Bill 27**”).

## (Limited) Ban on Post Employment Non-Competition Agreements

- Under Bill 27, employers in Ontario are prohibited from entering into non-compete agreements with employees, with some exceptions.
- Only non-competes that apply after the employment relationship between the employee and the employer ends.
- The Ontario Ministry of Labour’s position is that the ban only applies for non-compete agreements entered into after October 25, 2021.
- Courts still have jurisdiction to assess the enforceability of non-competition agreements.

# Non-Competition Agreements

## Application of the Ban:

- Only applies to employees working in Ontario and subject to the Ontario *Employment Standards Act, 2000*.
- Only applies between an employer and an employee.
- Applies beyond just an employment agreement and includes “ an agreement, or any part of an agreement, between an employer and an employee”.

## Exceptions

- Where there is a sale or lease of a business or part of a business and the seller/lessor becomes an employee of the purchaser as part of the sale or lease.
- Where the employee is an executive
  - *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-Competition Agreements

## New Caselaw

- *Parekh et al v. Schechter et al*, 2022 ONSC 302, dental corporations sought an injunction against a former employee in order to prevent him from practicing dentistry at another business.
- Sale of business restriction with a non-compete covenant restricting employment anywhere within a five-kilometre radius of the dental practice for a period of two years following the end of employment with the dental practice.
- less than two years after the sale, the employee resigned and began practicing at a competing dental corporation within a five-kilometre radius of the Plaintiff's dental practice.
- The Court found that there was “clear express legislative intent to make the ESA amendments applicable as of October 25, 2021, and not earlier”, and the ban on non-competition agreements introduced by the ESA did not apply in this case.



# **Working with the WSIB**

Karina Pylypczuk

# WSIB claims process

## Initiating a claim

- Worker must file their claim within 6 months of the date of accident/injury.
  - WSIB does have the discretion to extend.
- Employer must report the work-related accident if the employee required health care and/or as a result of the accident is:
  - Absent from regular work.
  - Earned less than regular pay for regular work.
  - Requires modified work at less than regular pay; or
  - Requires modified work at regular pay for more than 7 calendar days following the accident.

# **WSIB claims process**

## Claims determination

- Determination of eligibility
  - Work-relatedness
  - Accident occurred in the course of and arising out of employment
  - Pre-existing conditions

# WSIB claims process

## Claims determination

- The employer's role in claims determination.
  - Communication with the Case Manager.
    - Timely responses and significance of WSIB warnings.
  - Sharing of information with WSIB.

# WSIB claims process

## Return to work

- Section 40 (1) of the WSIA – Duty to Cooperate.
- Employer should actively engage the employee and the WSIB in determining whether employee can return to regular duties or perform modified work.
  - Goal is to return employee to work as soon as possible.
    - Do not wait for the WSIB to tell you to return the employee to work – contact the employee directly.
  - Generally, the more time lost, the higher premiums become.
- Modified work does not have to be in the employee's pre-injury position.
- Consider different positions, modifications of pre-injury position, graduated return to work.
- If employee capabilities or employer modifications are unclear, WSIB will assign Return to Work Specialist to meet with employee and employer to review return to work options.
- Employer will receive WSIB Functional Abilities Forms with updates on restrictions and abilities.

# WSIB re-employment obligations

- Employees aren't always able to return to work soon after an injury, so how long is the employer required to keep their position open?
- Section 41 – Obligation to re-employ
  - Pre-requisite: employee must have been employed by employer for at least 1 year prior to injury
  - Duration: lasts until the earlier of:
    - Two years from the date of injury;
    - One year after the employee is medically able to perform their pre-injury duties; and
    - The employee reaching age 65
  - Employer must offer the employee either:
    - Their pre-injury position
    - A position that's nature and earnings are comparable to the employee's pre-injury position

# WSIB re-employment obligations

## Terminating an employee following a WSIB accident/injury

- If an employer returns an employee to work following a WSIB compensable accident/injury and then within 6 months of the return to work terminates the employee's employment, there is an automatic presumption that the employer has breached their WSIB re-employment obligations.
- Employer is given the opportunity to rebut the presumption.
  - Must show that the decision to terminate was entirely unrelated to WSIB claim.
- If the WSIB finds the employer has breached the re-employment obligation, financial penalties follow.

# WSIB appeals

## Process and Timelines

- WSIB will issue a written decision.
  - Immediately after, either party can write to provide additional/new information and request a reconsideration of the decision.
  - Reconsideration process.
- Intent to object.
  - Deadline for return to work decisions is 30 days.
  - For all other decisions, the deadline is 6 months.

# WSIB appeals

## Process and timelines

- Once one party has filed an Intent to Object form, the other party will be contacted to complete a participant form.
  - Employer Participant Form must be filed within 30 days of date of WSIB letter.
    - Opportunity to request hearing in writing or oral hearing.
    - If form not filed, appeal decided without party's participation.
  - If working with external legal counsel, a Direction of Authorization form must be filed as well.
- Next Steps:
  - Receipt of claim file.
  - Review claim file and consider whether any information missing.
  - Hearing will not proceed until objecting party files an Appeal Readiness Form.

# WSIB appeals

## Hearing considerations

- Appeal can sometimes be years after the workplace accident/injury, depending on when the Appeal Readiness Form is filed.
  - WSIB Claim Files are voluminous and thorough, but still important for employers to document WSIB processes and keep records.
    - Can help counteract the fading of memories over time.
  - Everything in the WSIB Claim File goes into the evidence – does not have to be independently proven.
- Nature of the hearing.
  - Appeals can be decided by way of written submissions or an oral hearing.
  - As of right now, still virtual – video or telephone conference.
  - Less formality, less adversarial.
    - Cross questioning versus cross examining.
    - Who can ask questions of a witness.

# WSIAT appeals

## Workplace Safety and Insurance Appeals Tribunal

- Final level of appeal for WSIB decisions.
- Six month deadline to appeal.
  - Unlike WSIB, once appeal is started, Confirmation of Appeal form must be submitted within 24 months of filing the Notice of Appeal.
    - If not filed, WSIAT has the discretion to close the appeal.
- WSIAT may also assign appeal to a written hearings or oral hearing. Decision is made by the WSIAT.

# Thank you



Matthew J. G. Curtis  
Partner  
D+1 416 367 6767  
matthew.curtis@dentons.com



Emily Kroboth  
Associate  
D+1 416 361 2378  
emily.kroboth@dentons.com



Karina Pylypczuk  
Associate  
D+1 416-862-3436  
karina.pylypczuk@dentons.com

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