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Legal Workplace Trends to Watch

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Canada's New Recruitment Paradigm

Canada's New Recruitment Paradigm

- New recruitment laws are emerging, with the goal of promoting equitable access to the workplace:
  - Pay transparency
  - "Canadian experience" requirements
  - Use of Artificial Intelligence (AI) in the recruitment process
  - Disclosure of job vacancy

1. Pay Transparency in Recruiting

Pay Transparency Legislation in Canada

- Bill 149, *Working for Workers Four Act, 2024* recently received Royal Assent in Ontario and has a pay transparency element that will come into force upon proclamation (likely after regulations are developed).
  - This appears to be a trend across Canada.
  - Currently in force in BC, NS, PEI and the federal jurisdiction.
  - NL has adopted pay transparency legislation but has yet to declare it into force.

- The requirements of pay transparency legislation vary widely, but generally include:
  - Mandatory disclosure of expected compensation in job advertisements.
  - Prohibition on asking job candidates about compensation history.
  - Prohibition on reprisal against employees or candidates for seeking compensation information or disclosing their own compensation.
  - Mandatory pay transparency reports about an organization's compensation practices, provided to government and/or disclosed publicly.

Pay Transparency in Job Advertisements

- Ontario will soon have pay transparency legislation requires that employers disclose in **external** job advertisements the **expected compensation for the offered position.**

- Employers will be required to disclose either:
  - the expected compensation for a position; or
  - the **range** of expected compensation for a position.

Pay Transparency in Job Advertisements

- Common questions in meeting pay transparency requirements will likely include:
  - Are there exceptions for certain job categories (e.g. executive roles)?
  - How wide can an expected compensation range be?
  - Are employers required to described base salary or wage only, or all forms of compensation?
  - Can an employer negotiate compensation that is not listed in the job advertisement?

- Some of these questions may be resolved by regulation or government guidance, others may not.
  - BC has issued brief, non-binding guidance for some questions but has not created regulations on the subject.
  - Ontario's Labour Minister David Piccini has suggested to the media that the government is concerned with the lack of transparency surrounding positions with an annual salary of $100,000 or less.

2. Canadian Experience in Recruiting

“Canadian Experience” as a job requirement

- Bill 149, *Working for Workers Four Act, 2024* recently received Royal Assent in Ontario and contains a prohibition on including a “Canadian experience” requirement in job ads:
  - “No employer who advertises a publicly advertised job posting shall include in the posting or in any associated application form any requirements related to Canadian experience.”

- When this requirement comes into force, Ontario will be the only jurisdiction in Canada with such a prohibition.

- The Ontario government has stated the purpose of this prohibition is to:
  - Enable qualified workers to fill highly in-demand jobs, especially in health care and the skilled trades.
  - Help more qualified candidates progress in the interview process.
  - Follows up recent legislation prohibiting regulated professions from requiring discriminatory Canadian work experience requirements in licensing for more than 30 occupations.

“Canadian Experience” and professional accreditation

- Ontario is removing barriers to professional certification for workers with foreign experience or foreign training:
  - Amendments to ON’s *Fair Access to Regulated Professions and Compulsory Trades Act, 2006* came into force in December 2023.

- Both prohibit professional regulation bodies from requiring “Canadian experience” as a qualification for registration.

- These changes are intended to increase the number of foreign-trained, Canadian-accredited workers in the workforce.

- Result may be more candidates qualified for advertised jobs, **unless there are “Canadian experience” requirements**.

“Canadian Experience” as proxy ground discrimination

- Bill 149, *Working for Workers Four Act, 2024* does not prohibit “Canadian experience” as a job requirement *per se*. It simply cannot be included in job ads.

- However, employers should only make a hiring decisions based on place of training/experience if that is a ***bona fide* occupational requirement**.

- “Canadian experience” may be a *proxy ground* for “place of origin” discrimination under human rights legislation.
  - Confirming relevance/value of non-Canadian experience is not discriminatory.
  - Discrimination arises where a Canadian experience requirement is arbitrary and not a demonstrable BFOR, and the employer is not open to the value of experience gained elsewhere.

3. Artificial Intelligence in Recruiting

Disclosure of Artificial Intelligence in the recruiting process

- Bill 149, *Working for Workers Four Act, 2024* recently received Royal Assent in Ontario and contains a requirement that employers disclose the use of Artificial Intelligence in recruiting:
  - "Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence."

- When this requirement comes into force upon proclamation, Ontario will be the only jurisdiction in Canada with such a prohibition.

- Parliament is currently considering the *Artificial Intelligence and Data Act* (AIDA) as part of Bill C-27, the *Digital Charter Implementation Act, 2022.*
  - AIDA is a more rigorous regulatory regime for use of AI in employment in the federal jurisdiction.

Use of Artificial Intelligence in the recruiting process

- AI tools for screening, assessing or selecting job candidates are rapidly evolving. Examples include:
  - **ChatBots** (AI interviewers for initial rounds of interviews for large application pools)
  - **Screening software** (candidate resumes screened against data of ideal candidate or successful past candidates)
  - **Job simulation tests** (simulations testing prospective candidates' skills through problem-solving exercises)
  - **Video interviews** (employers ask candidates for audio-video recordings of their responses to pre-determined question list. AI analyzes word choice, tonality, and inflection to make "right fit" determination.)
  - **Social media scrapes** (AI analyzes social media of prospective candidates)

- However, AI tools are prone to flaws and can result in unlawful discrimination if poorly designed or misused.
- Disclosure of use of AI in the recruiting process may increase scrutiny of the functioning of AI tools, and the results they yield.

Artificial Intelligence and discrimination

- Technical limitations make AI tools prone to inadvertent, discriminatory results:
  - Camera angles, accents, and culturally influenced mannerisms and expressions have been found to influence AI filtering (especially in ChatBot functions).
  - Pools of resumes or other “ideal” candidate documents can contain hidden patterns that lead an AI to prioritize some individuals over others based on protected human rights grounds.

- For example - in 2015 Amazon developed a candidate-screening AI based on its existing employees’ resumes.
  - Amazon’s workforce was disproportionately male. Characteristics that tended to appear on male resumes were prioritized. Characteristics that tended to appear of female resumes were penalized.
  - Candidates tended to be screened out if their resume referenced participation in women’s sports, or attendance at an all-women’s college.

Preparing for scrutiny of Artificial Intelligence in recruiting

- Bill 149, *Working for Workers Four Act, 2024* requires only disclosure of use of AI in recruiting – it does not regulate how that AI is used. However:
  - human rights legislation prohibits discriminatory recruiting practices and would apply to discriminatory AI.
  - governments are considering more rigorous standards to use of AI (as we may eventually see from AIDA).

- For guidance on potential best practices, we can look to emerging standards elsewhere:
  - proposed and in-force laws in NY require employers to conduct “disparate impact analysis” on AI recruiting tools.
  - proposed laws in NJ require vendors of AI recruiting tools to conduct similar “disparate impact analysis”.

4. Job Vacancy and Applicant Communication

Disclosure of job vacancy

- Ontario's Bill 190, *Working for Workers Five Act, 2024* is currently at second reading. If adopted and declared in force, Bill 190 would require:
  - "Every employer who advertises a publicly advertised job posting shall include in the posting:
    - (a) a statement disclosing whether the posting is for an existing vacancy or not; and
    - (b) such other information as may be prescribed."

- This provision is intended to reduce the impact of "ghost jobs", giving job seekers a realistic view of available positions.

- A "ghost job" is an advertisement for a position the employer does not need to fill. In surveys, employers have reported posting "ghost jobs" as a means of:
  - Maintaining a pool of candidates in case staffing needs arise.
  - Soliciting applications on an ongoing basis in the hopes a "unicorn" candidate will apply.
  - Convincing overworked staff that an effort is underway to hire help.

Communicating with job applicants

- If adopted and declared in force, Bill 190 would require :
  - “If an employer interviews an applicant for a publicly advertised job posting, the employer shall, within the prescribed time period, provide the applicant with the prescribed information”

- This provision is intended to reduce the frustration job applicants experience in not knowing whether they have been passed over after an interview, or might still have a chance

- This requirement must still be fleshed out in regulation.
  - Based on public statements by Ontario Labour Minister David Piccinni the notification requirements provided for under eventual regulation are likely to be minimal – perhaps as simple as informing the candidate they will not continue in the recruitment process.

Education First

- The Ontario government has signalled its approach to “ghost jobs” and applicant communication will be “education first”.

- In news releases and in statements by Minister Piccini, the government has stated:
  - It intends to consult with stakeholders before finalizing its approach to enforcement.
  - It may implement a complaint line through which job applicants could report non-compliance, allowing the Ministry of Labour to follow up by informing employers of their responsibilities under the ESA.
  - Only repeated non-compliance would attract fines under the ESA.

5. The Move to Ban Sick Notes

The pros and cons of sick notes

- A “sick note” is written confirmation from a regulated health professional that an employee’s short-term absence from work was for medical reasons.
- In this sense, sick notes should not be confused with medical information required for disability accommodation.

Pros

- (Somewhat) reliable third-party confirmation of medical reason for absence
- Evidence for later use if any dishonesty/credibility issues arise
- Can provide important details re: return to work timing and conditions

Cons

- Can be time-consuming and (potentially) costly for employee to obtain
- May require employee to travel for assessment when ill or injured
- Consumes physician time that might otherwise be spent on more important public health matters

The patchwork of sick note rules in Canada (for context)

- Generally speaking, any rules around sick notes (where they exist) relate solely to requirements for sick notes in relation to minimum standards leaves.
- Obviously, in unionized environments collective agreements may provide further limits on use of sick notes.
- Depending on jurisdiction, rules may provide:
  - No restriction on sick note requests from employers
  - Allowance for sick notes related to statutory leaves after a defined number of days
  - Prohibition on sick notes related to statutory leaves before a defined number of days
  - Prohibition on sick notes for any purpose before a defined number of days (i.e. not just for minimum standards leaves)

The patchwork of sick note rules in Canada

Federal
- Permitted >5 days
- Related to stat leave

Alberta
- No prohibition

British Columbia
- No prohibition

Manitoba
- No prohibition

New Brunswick
- Permitted after 4+ days
- Related to stat leave

Newfoundland…
- Permitted after 3+ days
- Related to stat leave

Nova Scotia
- Permitted >5 days OR 2+ absences of <5 days
- **Applies for all purposes**

Ontario
- Prohibited before 3 days
- Related to stat leave

Prince Edward Island
- Permitted after 3+ days
- Related to stat leave
- Effective Oct. 1, 2024

Quebec
- No prohibition
- **Legislation pending**

Saskatchewan
- No prohibition

6. Ontario's Sick Leave Amendments

ESA Sick Leave Amendments

- **ESA sick leave (s. 50)**
  - 3 unpaid days of leave per calendar year
  - For use in cases of “personal illness, injury or medical emergency”
  - Entitlement arises after 2 weeks’ service

- Current s. 50(6)
  - (6) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

- Ontario’s Bill 190 proposes the following revision to s. 50(6)
  - (6) Subject to subsection (6.1), an employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.
  - (6.1) An employer **shall not require** an employee to provide **a certificate from a qualified health practitioner** as evidence under subsection (6).

ESA Sick Leave Amendments

- **Attestation permitted.** In a news release, the MOL stated:
  - "…To maintain accountability in the office without creating unnecessary paperwork for healthcare professionals, **employers can still request another form of evidence** that is reasonable in the circumstances, **such as an attestation**. Future ministry guidance would be developed to inform this."

- **If this change is made to the ESA**:
  - Sick notes may still be required for sick leave in excess of the ESA minimum (i.e. in excess of 3 days)
  - It is likely that sick notes cannot be required for first 3 days of any paid sick leave intended as a greater benefit than the 3 ESA unpaid days
  - Employers should review policies/procedures for sick note requirements
  - Employers can still require evidence of entitlement to sick leave – either in a formal attestation document or some other recorded explanation. Any subsequent evidence of misuse may be grounds for investigation.

Responding to sick days without sick notes

- **Trust employees for short absences.** In Ontario, the proposed bar on sick notes applies only to the 3-day statutory sick leave period. Once that leave is exhausted the employer is free to ask for sick notes again. Employers must simply trust employees to use sick days properly for 3 days per year, unless suspicion of dishonest use arises.

- **Require other evidence.** Where suspicion of misuse exists (or as a general practice), consider requiring other evidence relating to the absence. For example, require employees to complete an attestation or other simple form explaining that their absence was related to an illness or injury. While this is not third-party verification, it is evidence to rely upon in later disciple related to dishonesty and misuse of leave.

- **Investigate suspicious or patterned absences.** If an employee has reported an absence as medical, and evidence to the contrary emerges (social media posts; stories of the great concert they attended; etc.) put them to an explanation. In the absence of an adequate explanation, consider discipline.

  With respect to patterned absences, the proposed Ontario prohibition on sick notes is brief (only 3 days). Engage an accommodation dialogue for repeated absences, or simply require sick notes for absences after the prohibition is surpassed.

The Shifting Target of Termination Liability

7. Dufault and Ontario Termination Clauses

The next big problem, or no big deal?

Dufault v. The Corporation of the Township of Ignace, 2024 ONSC 1029

The latest innovation in undermining termination clauses

- Plaintiff argued this termination was void for contracting out of the Ontario ESA:
  - "*4.02 The Township may **at its sole discretion** and without cause, terminate this Agreement and the Employee's employment thereunder **at any time** upon giving to the Employee written notice as follows…*"

- The judge concluded:
  - The ESA prohibits an employer from terminating employees in defined circumstances. For example:
    - When an employee returns from a protected leave.
    - In reprisal for exercising a right under the ESA.
  - The termination clause misstates the ESA by giving the employer "sole discretion" to terminate "at any time".

Immediate Implications

- Any wording like the following may be a problem in termination clauses:
  - “at any time”
  - “at the employer’s sole discretion”
  - “for any reason”

- Each of these may be read as reserving the employer’s right to terminate for **an unlawful reason**.

- Employers should:
  - Review existing agreements for these phrases.
  - Avoid use of these phrases in termination clauses in future.

Defending existing agreements - A dire picture in the news

- A prominent plaintiff-side recently took a public position on *Dufault*:

  “the impact of this case will be to nullify the termination provisions of virtually all Canadian employment contracts.”

- This is an exaggeration. *Dufault* is worrying in Ontario, but its impact is likely limited.

- *Dufault* departs from existing case law in this province, and there is a chance courts will decline to follow it.

Defending against *Dufault* – diverging decisions

- In 2022 an Ontario court held this termination clause language was enforceable:

  "Your employment may be terminated without cause **for any reason** upon the provision of notice equal to…[etc]"

  – *Henderson v. Slavkin et al*., 2022 ONSC 2964

- Plaintiff argued an employer cannot terminate an employee "for any reason".
  – Plaintiff cited 47 circumstances in various statutes in which termination is specifically prohibited.

- In rejecting this argument (along with others aimed at undermining the clause), the court stated judges should not "**strain to create ambiguity where none exists**".

Defending against *Dufault* – silence, not a direct breach

- In Ontario case law, termination clauses are usually invalidated based on **direct breach** of the ESA.
  - An example of direct breach is a clause which states “Your employment may be terminated **without notice**”.

- Where clauses are silent on compliance with legislation, Ontario courts historically find no breach.

- There is no direct breach in the *Dufault* clause. There is no ESA prohibition on:
  - timing of a termination; or
  - the employer being the sole decision-maker in a termination.

- We have principled grounds for arguing *Dufault* is wrongly decided. Time will tell whether it is followed.

8. Is 30 the New 24?

Reasonable notice periods continue their slow creep upwards

Common law reasonable notice

- At common law employers must provide “**reasonable notice”** for a termination without cause.

- The “reasonable notice” period reflects the time needed to find replacement employment of a similar kind.

- The principal factors for determining the length of reasonable notice, referred to as “*Bardal*” factors, are:
  - Employee age
  - Employee’s length of service
  - Character of the employee’s position
  - Availability of similar employment

- If reasonable notice is not provided, the employee can bring a claim for **damages for the entire period**.
- The presumption of “reasonable notice” can be rebutted with an enforceable termination clause.

The ever-increasing soft cap on reasonable notice

- For decades, Canadian courts have diverged on how long a reasonable notice period might be.
  - Courts generally agree there is no fixed ceiling but have diverged on what the highest reasonable awards might be.

- "I make the comment, boldly perhaps, that **12 months** appears to be the reasonable maximum period of notice available **in any case in which everything favors the employee**."
  - *Oshust v. Foster Wheeler Ltd.*, 1987 CarswellOnt 2371 (Ont. High Court of Justice)

- "Although it is true that reasonable notice of employment termination must be determined on a case-specific basis and **there is no absolute upper limit or 'cap'** on what constitutes reasonable notice, generally **only exceptional circumstances** will support a base notice period in excess of **24 months**..."
  - *Lowndes v. Summit Ford Sales Ltd.*, 2006 CarswellOnt 11 (Ont. Court of Appeal)

“Exceptional circumstances” found in traditional factors

- In two 2023 decisions, the Ontario Court of Appeal upheld two notice period awards in excess of 24 months.
  - The Court confirmed “exceptional circumstances” are required but were present in each case.
  - In *Milwid v. IBM Canada Ltd*., 2023 ONCA 702 the Court upheld a 27 month notice period.

- In *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696 the Court upheld a **30-month award** based on:
  - The employee’s age of 64 years
  - Her long service of 38.5 years
  - The employee’s specialization in software design for a unique product
  - Lack of similar employment in the employee’s home community of Belleville

- These details are simply the *Bardal* factors - age; service; character of employment; and availability of employment.
- In Ontario, the “exceptional” circumstances for a 30-month notice period appear to be available only on traditional factors routinely applied in reasonable notice determinations.

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