



Workplace Trends to Watch

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AGENDA

- 1. Employment Standards Act, 2000 Update**
 - (i) Written Policy on Disconnecting from Work
 - (ii) Written Policy on Electronic Monitoring
 - (iii) Non-Compete Agreements
 - (iv) Temporary Help Agency and Recruiters Licensing System
 - (v) Reservist Leave
- 2. Termination Provisions in Employment Agreements**
- 3. Recent Cases on Vaccination Policies**
- 4. Remote Working Arrangements**

1. ESA Update

(i) Written Policy on Disconnecting from Work

- No change, other than must have a disconnecting from work policy.
- Required as of June 2, 2022, if have 25+ employees on January 1, 2022 (or January 1 of any subsequent year).
- Employees have absolutely NO additional rights; rights are as currently exist in the ESA (or collective agreement, contract or policy).
- Currently applies to all employees; no managerial, supervisory or professional exceptions.
- Drafting considerations/potential issues:
 - morale
 - (mis) education

1. ESA Update

(ii) Written Policy on Electronic Monitoring

- **If 25+ employees on January 1, 2022, written policy must be posted by October 11, 2022.**
- **Also does not provide any new rights, although does provide for transparency.**
- **The policy must state whether the employer electronically monitors employees.**
- **If employer does electronically monitor employees, then the policy must include:**
 - a description of how, and in what circumstances, the employer electronically monitors employees; and
 - the purposes for which the employer may use the information obtained through electronic monitoring of employees.
- **Consider steps to take to create policy.**

1. ESA Update

(iii) Non-Compete Agreements

- If you are not a “chief”, a new non-compete agreement is prohibited as of October 25, 2021.
- Exception – sale of business.
- Not a huge change – many non-competes are unenforceable at common law.
- Real beneficiaries – executives that are not part of the C-Suite.
- Non-solicitation agreements not affected by the change in legislation; consider using non-solicits, given premium on good/qualified employees.

1. ESA Update

(iv) Temporary Help Agency and Recruiters Licensing System

- **Government intends to introduce legislation that will require temporary help agencies (THAs) and recruiters to be licensed.**
- **Employers using unlicensed THAs or recruiters will be subject to penalties.**
- **As well, if THA/recruiter requires workers to pay improper fees, employer may have to repay workers for improper fees charged.**
- **Also, Government is proposing to have a dedicated team of officers to enforce these new laws.**

1. ESA Update

(v) Reservist Leave

- **Employees are entitled to reservist leave after three months (instead of six).**
- **Reservist leave is unique – employers do not have to continue benefits while employee is on leave, and employer can postpone the employee’s reinstatement for two weeks, or until the next pay period.**
- **However, reinstatement is to the same job, if it still exists, or a similar job, if it does not exist.**
- **Reservist leave is for deployment to a Canadian Forces operation outside of Canada, or a deployment inside Canada that is to deal with an emergency or its aftermath.**

2. Termination Provisions in Employment Agreements

➤ Termination Clauses – Are They Worth the Paper?

- Previously, without cause clauses in employment agreements found to be unenforceable for contracting out of ESA – i.e.: benefit continuation, wages/bonus.
- Waksdale (2020) – “just cause” at common law is broader than “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned”.
- Therefore just cause clause not enforceable.
- Just cause provision found to be inextricably linked to without cause provision.
- As such, otherwise valid “without cause” termination clause that limited entitlements upon termination found to be unenforceable, too.

2. Termination Provisions in Employment Agreements (cont'd)

- Employers had faint hope: the “Sophisticated Employee”: *Rahman v. Cannon Design Architecture* (2021).
- In *Rahman*, Ontario Superior Court determined that where there was no inequality of bargaining power, and employee had legal advice, employee should be held to agreement in respect of the without cause termination clause, even if with cause termination clause was unenforceable.
- Two weeks ago, Ontario Court of Appeal disagreed.
- What's an employer to do?
 - New employment agreements? (Consideration is an issue.)
 - Notice of change to clause, to comply with legislation.

3. Recent Cases on Vaccination Policies

- Still “reasonable” to have a vaccination policy: June 9, 2022 (*Alectra and PWU*).
- However, suggested considering amendments to policy, “as relevant circumstances change”.
- Religious exemptions have been recognized: May 30, 2022 (*City of Hamilton and CUPE*). Arbitrator relied on SCC’s decision in *Amselem* (2004). *Amselem* provides:

“... the grievor must demonstrate that she has a practice or belief, that has a nexus with her creed, that calls for a particular line of conduct, here the decision to not get vaccinated, “either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.”

3. Recent Cases on Vaccination Policies (cont'd)

- **Requiring employees to take rapid tests at home if not vaccinated is reasonable: May 10, 2022. (Treasury Board and Paulos).**
 - **Also, termination was reasonable, given employee's intransigent stance regarding the relatively non-invasive requirement to take rapid tests.**
- **Employer can require employees to disclose historical vaccination records, if employee is claiming a religious exemption, and claiming to be opposed to all vaccinations: May 3, 2022 (VON and ONA).**
 - **However, there is a limit as to how far back the employee is required to go.**

3. Recent Cases on Vaccination Policies (cont'd)

- **Testing is not better than vaccination: April 27, 2022 (Canada Post and CUPW).**
 - **However, very fact specific – Canada Post bargaining unit employees come into contact with a large number of other employees, and a large number of members of the public, many of whom may be vulnerable.**
- **Not necessarily a breach of the duty of fair representation for a union to refuse to grieve an employee's termination of employment for failing to comply with the employer's vaccination policy: April 8, 2022 (Gamberg and Pipefitters).**
 - **Board concluded that union had not acted in a manner that was arbitrary or in bad faith.**

3. Recent Cases on Vaccination Policies (cont'd)

- **A vaccination policy that required employees to take booster shots was reasonable, even in “the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements”: April 4, 2022 (Extendicare Lynde Creek Retirement Residence and UFCW).**
- **In the context of retirement residence, with collective agreement language that addressed vaccination.**

4. Remote Working Arrangements

➤ Benefits

- employee morale
- reduced overhead
- reduced carbon emissions
- cost and time savings for employees

➤ Detriments

- employee morale
- overhead may be a fixed cost
- loss of knowledge sharing/transfer
- loss of culture
- loss of loyalty

4. Remote Working Arrangements (cont'd)

- **As much as possible, approach should be consistent with all levels of staff.**

- ***WARNING, WARNING***
 - If employee wants to work outside of Ontario:
 - tax considerations
 - possibility of withholding and payroll taxes for both jurisdictions
 - company found to be conducting business in a foreign jurisdiction, resulting in tax liability
 - potential reporting obligations in a foreign jurisdiction

4. Remote Working Arrangements (cont'd)

- employment consideration
 - which law applies? Ontario will take jurisdiction, but is prepared to recognize joint or common jurisdiction
 - wage requirements
 - hours of work maximums
 - statutory holidays
 - statutory exemptions
 - occupational health and safety obligations
- proceed with caution in respect of remote working arrangements that are out of province



Questions & Answers