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Workplace Law: Updates and Best Practices 2025

Anne Gallop, Partner

June 26, 2025

Norton Rose Fulbright Canada LLP

Agenda

01 **New developments in Ontario workplace laws**

02 **Good news on termination clauses**

03 **Workplace harassment and privacy**

04 **Managing difficult mental health disability scenarios**

1. New developments in Ontario workplace laws

Employment Standards Act, 2000

Working for Workers Act Recent, Pending and Proposed Changes

Topic	Change	In-Force Date
Leaves of Absence	Long-term illness leave: Unpaid leave of up to 27 weeks per year	Jun 19, 2025
Employment Information	Employers must new and existing employees with **information about employment,** including employer's legal name; employer contact information; wages and hours of work; and pay period info.	Jul 1, 2025
Recruiting	**Publicly advertised job postings** must contain (1) expected compensation; (2) disclosure of AI use in recruiting; (3) no Canadian experience requirement; and (4) details regarding job vacancy. Employers must also **inform interviewees** of the outcome of job interviews.	Jan 1, 2026
Leaves of Absence	Placement of a child leave: Unpaid leave of up to 16 weeks	Proclamation
Leaves of Absence	Job seeking leave: Employees who have received **group termination notice** will be entitled to 3 unpaid days for activities related to job-seeking.	*Proposed in WFWA 7*
Temporary Layoffs	Maximum temporary layoff will increase to 52 weeks in a 78-week period with employee agreement and government approval.	*Proposed in WFWA 7*

Other Legislation

Working for Workers Act Recent, Pending and Proposed Changes

Topic and Legislation	Change	In-Force Date
Washrooms *(WSIA)*	Constructors and employers must maintain worker washroom facilities in clean and sanitary condition.	Jul 1, 2025
Washrooms *(WSIA)*	Constructors must keep a record of cleaning and servicing worker washrooms.	Jan 1, 2026
Defibrillator Costs *(OHSA)*	Where employers are required by legislation to equip the workplace with a defibrillator, the WSIB will reimburse the costs.	*Proposed in WFWA 7*
Benefits Claims *(WSIA)*	Employers are prohibited from making false or misleading statements to the WSIB in connection with an employee's claim for benefits.	*Proposed in WFWA 7*
Administrative Penalties *(OHSA and WSIA)*	Both the OHSA and WSIA will be amended to allow for administrative monetary penalties for certain legislative breaches. Regulations to follow.	*Proposed in WFWA 7*

Ones to watch: OHSA Administrative Monetary Penalties

- **Bill 30, *Working for Workers Seven Act* proposes a new administrative monetary penalty (AMP) scheme.**
  - At present, penalties for OHSA breach are in the form of fines and other penalties which are applied **only after a charge laid by the Ministry of Labour, prosecution and conviction of an offence**.
  - If this change is adopted, MOL inspectors will be empowered to issue AMPs for OHSA contravention (essentially like a speeding ticket).
  - If a person pays the AMP, they cannot be charged with an OHSA offence for the same contravention (the MOL will have to “pick its lane”).

- **A shift to OHSA enforcement via AMPs will likely mean:**
  - The burden will shift to challenging an AMP, as opposed to the Crown needing to prove a breach.
  - It will be easier for the MOL to issue fines for minor OHSA contraventions (avoiding the need for prosecutions).
  - OHSA compliance, and cooperation with MOL inspectors, will be top of mind to avoid AMPs.

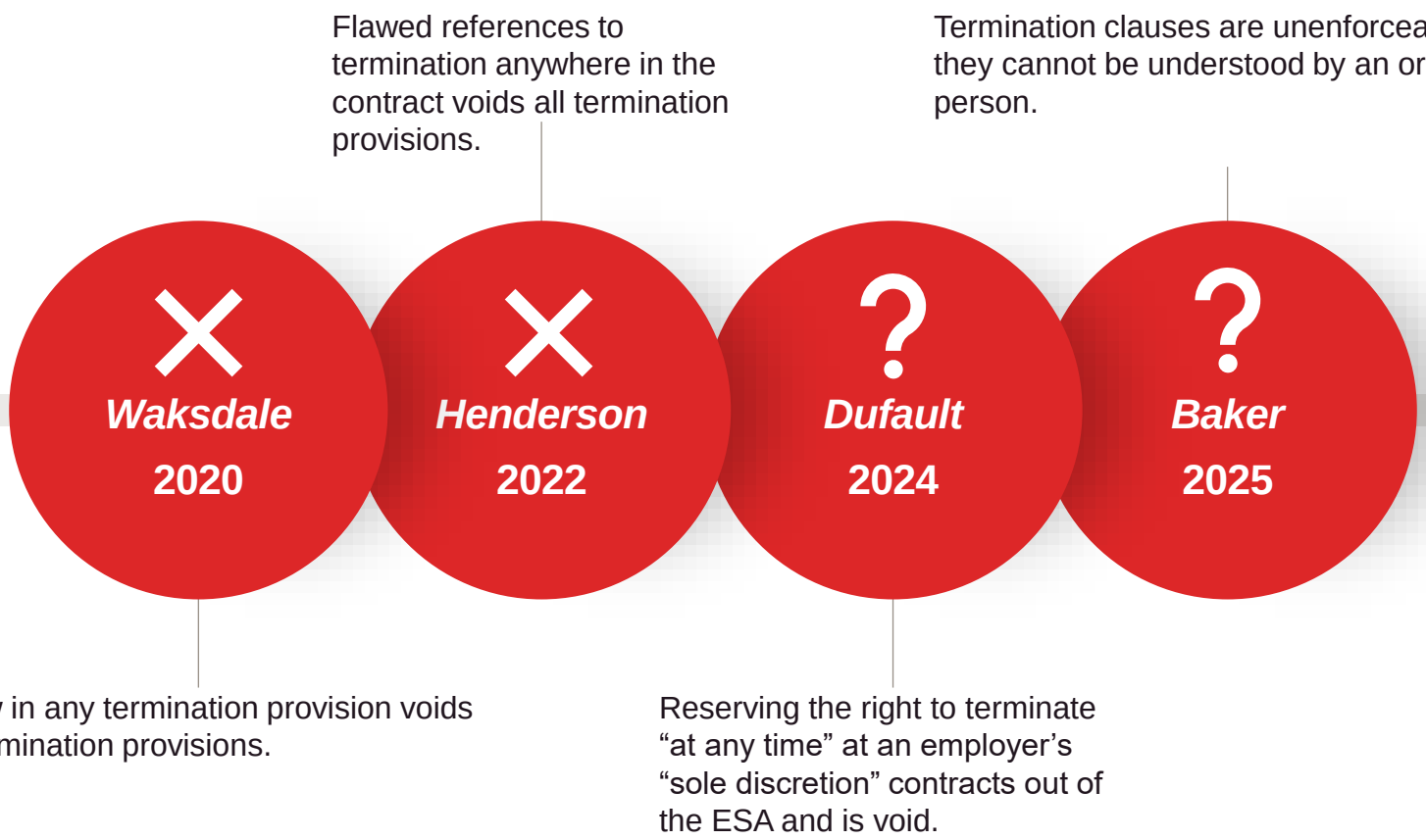
Ones to watch: Extended Temporary Layoffs

- **Bill 30, Working for Workers Seven Act proposes an extension to the ESA's "temporary layoff" scheme.**
  - At present, if an employee layoff extends beyond ESA maximum length it is a **deemed termination**.
  - The maximum "temporary layoff" under the ESA is **13 weeks in any 20 consecutive weeks**, and under certain enumerated circumstances, including continuing benefits, the maximum may be extended up to **30 weeks in any 52 consecutive weeks**.
  - Under the proposed amendments, the ESA would allow for layoffs of 35 or more weeks in 52 consecutive weeks, so long as the layoff is **less than 52 weeks in any 78 consecutive weeks**, and:
    - the employer and employee enter into an **agreement** for such an extended layoff;
    - the employer recalls the employee within the time set out in the agreement; and
    - the employer receives an **approval** for the extended layoff from the Director of Employment Standards.

- **This extension of the maximum layoff period is apparently in response to tariff concerns.**
  - The government's intention is to allow employers to retain workers for longer periods in the face of downturns.
  - It remains to be seen what the government will consider as a valid reason for approving an extended layoff.

2. Good news on termination clauses

A frustrating few years for termination clauses in Ontario



Incorporation by reference – is it still safe?

- A simple way to draft employment agreement clauses is to use **incorporation by reference.**
  - This means defining contract entitlements by referring to another document or piece of legislation.

- In doing so, we ensure compliance with the statute by referring to it directly. For example:

  "...you will be provided with only the minimum payments and entitlements, if any, owed to you under the *Ontario Employment Standards Act, 2000* and its Regulations…"

- **Many** termination clauses in Ontario depend on incorporation by reference for brevity and enforceability.
  - It reduces the need to itemize termination entitlements exhaustively.
  - It protects the contract from drafting errors that might void termination provisions.

Incorporation by reference – is it still safe?

- There is an obvious downside to “incorporation by reference” – it requires that a person **read and understand** another document in order to understand the contract.

- For example, in Ontario there are two standards of “cause” termination.
  - The common law standard requires only serious misconduct (whether wilful or not)
  - The ESA standard requires misconduct that is “wilful”

- If a contract states that upon termination for “cause” the employee will receive no notice except that which is required by the ESA, **it assumes the reader knows what the ESA cause standard is.**
  - Two recent decisions weighed in on whether this is a reasonable drafting technique:
    - *Bertsch v. Datastealth Inc*., 2024 ONSC 5593
    - *Baker v. Van Dolder’s Home Team Inc*., 2025 ONSC 952

The *Bertsch / Baker* Debate

"If this was a commercial contract with lawyers involved, the parties would be taken to understand the difference between a contractual definition of just cause, the common law definition of just cause, and the ESA definition …a regular employee cannot be expected to appreciate these differences." *(Baker)*

"The issue is not whether an ordinary person might arrive at an incorrect interpretation", but how the agreement can be reasonably interpreted" *(Bertsch)*

Bertsch v. Datastealth Inc., 2025 ONCA 379

The ONCA weighs in

- In *Bertsch* an employment agreement relied on incorporation by reference to define termination entitlements:

> "If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the *Ontario Employment Standards Act, 2000* and its Regulations…"

- The terminated employee argued '**an ordinary person**' could have misunderstood the clause to mean they could be terminated without ESA entitlements for negligent conduct.

- The ONCA rejected argument, holding that the issue is not what an ordinary person might understand, **but how the agreement can be reasonably interpreted.**
  - In this case, the clause specifically and unambiguously provided for ESA compliance.

Incorporation by reference is safe…for now

- **A win for employment contracts.** *Bertsch* is the first ONCA decision in several years to uphold the enforceability of an employment agreement termination clause. It is helpful to see that good drafting will still be upheld in the province!

- **Incorporation by reference is safe.** *Bertsch* forestalls the “ordinary person” standard of contract interpretation.
  - If the *Baker* position were correct, any termination clause that relies on referencing the ESA would be in danger because apparently ordinary people cannot be expected to fully understand what those provisions mean.
  - If *Bertsch* were decided the other way, we might have had to revert to exhaustively describing every possible termination scenario and associated entitlements in the employment agreement.

- **Unresolved termination clause case law.** The problematic *Dufault* decision is still out there and may be bad law. *Dufault* held that the wording “at any time” and the employer’s “sole discretion” can void a termination clause. Until we have guidance from the Court of Appeal on that wording, it is best avoided.

3. Private Communications and Harassment

When “none of your business” affects the business

- Normally, an employee’s off-duty conduct is “none of the employer’s business” **unless it affects the business.**

- An employer typically does not have a legitimate basis to inquire into an employee’s off-duty actions, or to discipline for those actions, unless there is:
  - An impact on the employee’s ability to perform their work productively and safely.
  - An impact on the employer’s operations or reputation.
  - An impact on other individuals in the workplace (e.g. through harassment or threats of violence).

- Where off-duty conduct affects the business, the employer may have grounds for investigation and discipline – **and may also have a statutory duty to investigate.**

The intersection of workplace safety and privacy

- Occupational health and safety legislation requires employers to take reasonable steps to **protect the workplace**.

- Among these obligations is the employer's duty to protect workers from **workplace harassment.** Ontario's *Occupational Health and Safety Act* requires, among other things, that an employer ensure:

  "an **investigation is conducted** into incidents and complaints of workplace harassment that is appropriate in the circumstances"

- The **scope** of this duty to investigate potential workplace harassment is vague when it comes to off-duty conduct.

Question: When is an employer required to pry into the private lives of employees in response to potential workplace harassment?

Metrolinx v. Amalgamated Transit Union, Local 1587, 2025 ONCA 415

Metrolinx – the intersection of privacy and statutory duties

- **Reports of an objectionable private group chat.** Metrolinx management received reports of a private employee group chat which, in part, discussed rumours about the sexual activities of female co-workers. A screenshot of some content was sent to an employee who was the subject of these rumours. That screenshot was shown to management, but the employee did not make a harassment complaint.

- **The employer investigates and terminates.** Management assigned an investigator to investigate potential harassment. The investigator interviewed a participant in the chat and received disclosure of the chat contents. The chat contained objectionable discussions about co-workers and management terminated five chat participants.

- **Union grieves successfully.** The union grieved the terminations on the basis that the employer had no legitimate reason to investigate the chat or access the chat history. The arbitrator agreed.

  The communications were not publicly disseminated and thus were private. The employee who received the screenshot did not file a complaint, so there was no statutory or contractual basis for a harassment investigation.

Metrolinx appealed.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2025 ONCA 415

Metrolinx – the intersection of privacy and statutory duties

- The ONCA quashed the arbitrator's decision and sent the matter back for a new hearing.

- Three key points emerge from the ONCA's decision.

01

The OHSA duty to investigate does not require a complaint

Employers are required to investigate when they become aware of a harassment incident, regardless of whether a complaint is filed.

02

Private chats are not off-limits if they are disclosed

When the group chat was forwarded to a co-worker, it became a workplace issue, triggering OHSA duties.

03

The decision to investigate should not turn on individual motivations

It is an error to assume harassment does not exist if no complaint is made. Victims of harassment may have many reasons for not complaining.

Management must make its own evaluations to meet its duty to protect the workplace.

4. Challenging Mental Health Disability Scenarios

Good procedure is key to responding to mental health disability challenges

- In responding to employee misconduct, where a mental health disability issue is suspected, we cannot know at the outset:
  - Whether there is a disability involved, and if so, the nature of the disability;
  - Whether the misconduct will ultimately resolve through a **discipline** or **accommodation** workflow;
  - How the employee will respond to management efforts to resolve the situation.

- A **defensible course of action** depends on:
  - Consistent **engagement** with the employee.
  - Collection of information to establish the **context** of the employee's actions.
  - **Openness** to accommodation if required in the circumstances.

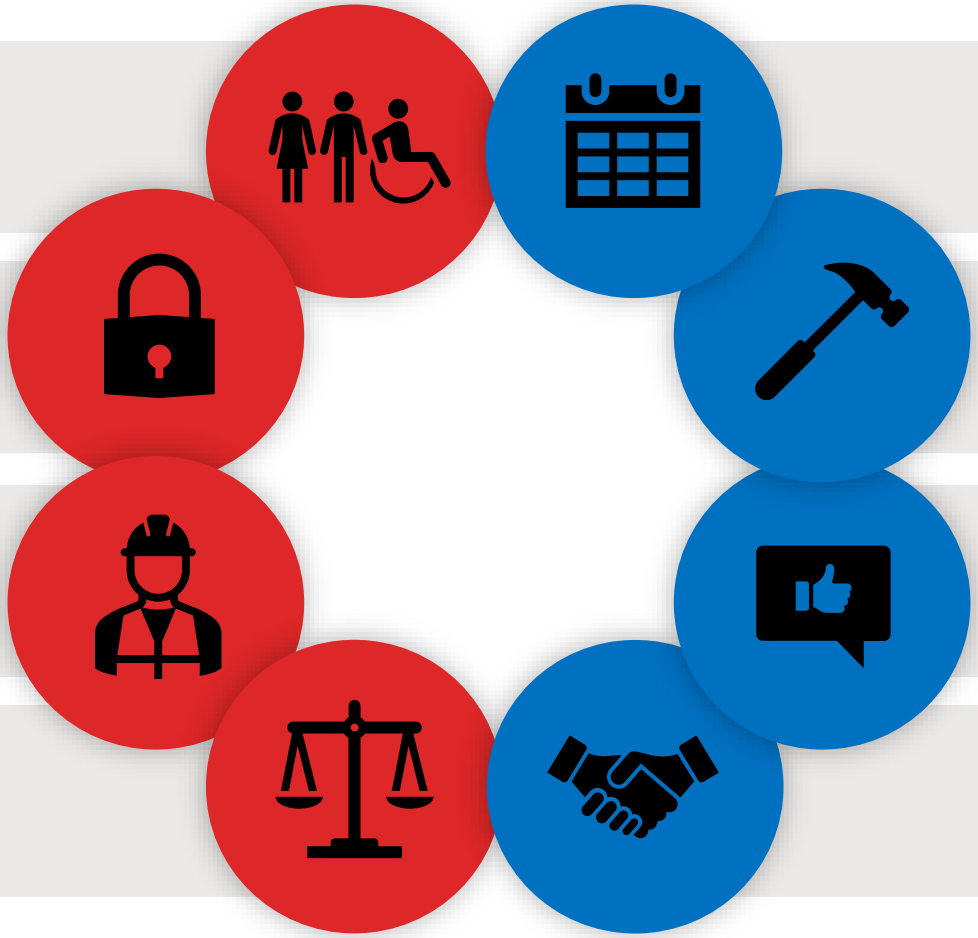
Balancing employer and employee obligations

Human Rights Law
Accommodate to undue hardship

Privacy Concerns
Collect only reasonable information; protect employee privacy

OH&S Law
Protect the workplace from harassment & violence

Additional Laws
Leaves; sick note laws; workplace policies; contracts; collective agreements; etc.



Attendance
Attend work and provide support for absences

Productive Work
Perform job duties, potentially with accommodation

Respectful Conduct
Refrain from discriminatory, harassing or violent conduct

Accommodation Cooperation
Request accommodation; provide medical information; participate in accommodation

Mental illness and accommodation

- A mental disorder may be a **disability** under the Ontario *Human Rights Code* and similar legislation across Canada. In Ontario the definition of disability includes “conditions of mental impairment” and “mental disorders”.

- Mental health disabilities are often **“invisible”** – an individual’s condition may not be readily apparent to others, or even to themselves.

- If an employee is unable to meet a workplace standard (i.e. misconduct) due to a disability, including a mental health disability, the employer has a **duty to accommodate.**
  - “Misconduct” might include failure to attend; being late; poor performance; disrespectful conduct; dishonesty; etc.

- One aspect of the duty to accommodate is the **duty to inquire**.
  - An employer cannot ignore signs that an absence is connected to a disability.

Scenario 1 – an unacknowledged mental health disability

- **An improbable allegation.** A remote employee initially reported harassment by a non-work party. The allegations lacked an “air of reality”, referencing well-known public figures as her harassers. She expanded allegations to include harassment by unnamed co-workers.

- **Unsustainable job performance.** The employee stopped using employer communications tech (MS Teams); was not responsive to work requests; sent inflammatory mass-emails to colleagues about her allegations.

- **Disengagement.** When asked for further information, the employee refused to elaborate, indicating her communications were being “hacked”; she declined to meet with medical professionals for assessment, insisting there was no medical issue; she declined to meet with management in person or via a live video call. The employee insisted on written communication only.

How should the employer respond?

Possible responses – do we have what we need?

Non-Culpable Behaviour	Culpable Behaviour
• **Medical:** Misconduct is related to disability	• **Medical:** Misconduct is not related to disability
• **Response:** Accommodation	• **Response:** Discipline/Performance management
• **Possible outcomes:**	• **Possible outcomes:**
– Simple return to work	– Job abandonment
– Accommodated return to work	– Attendance management
– Short- or long-term accommodated absence	– Progressive discipline
– Undue hardship and frustration of employment	– Immediate termination for just cause

- **We need information to choose the right path! We have not only the right, but the obligation, to insist on it.**
  - Responding with discipline without enough information may breach the duty to accommodate.
  - Returning the employee to work without enough information may be unsafe for the employee and/or the workplace.

Scenario 1 – Good procedure pushes a matter to resolution

- **Investigated allegations.** Employer investigated the allegations on the little information provided and sought further details. The employee provided none. Employer found no security breaches or evidence of harassment.

- **Persisted in seeking information.** Employer consistently asked the employee for information substantiating allegations or supporting STD leave or accommodations from a disability perspective.

- **Set acceptable conduct standard.** Employer sent a series of letters prohibiting inappropriate messaging to colleagues, requiring adherence to standard practices, requiring attendance a virtual meetings, and warning of potential termination.

- **Managed performance while remaining open to accommodation.** Employer urged medical consultation and consistently offered support for STD leave or necessary accommodations. In the absence of participation in accommodation process, employee was ultimately terminated for cause.

- **Adjudicator found cause for dismissal.** Employer did all it could, including remaining open to accommodation.

Scenario 2 - Responding to Ambiguous Medical Information

- **Conflict with a new supervisor.** After a change in management, the Grievor reported escalating tension with his new supervisors. In the midst of performance management efforts from the supervisors, the Grievor took a medical leave.

- **Ambiguous medical information.** Medical notes from the Grievor's MD were vague, referring only to a "medical condition" or "mental health." After seven months of employer requests for more medical information, MD confirmed depression/anxiety disorder.
  - The MD also provided a suggested "accommodation plan" which prohibited contact with previous supervisors.

- **Employer seeks clarification.** The employer sought more information on non-contact with supervisors and a variety of other restrictions and suggested accommodations. Several revised reports from the MD provided contradictory guidance.

- **Undue hardship and termination.** The employer refused return-to-work plans put forward by the union, asserting they did not fit a variety of restrictions set out in the contradictory medical reports. However, the employer did not seek further medical clarification to resolve the contradictions. The employer asserted undue hardship and terminated.

Scenario 2 – Assertive Procedure Must Adapt to Changing Information

- **Employers are entitled to sufficiently detailed information.** The initial “prescription pad” medical information in this case was insufficient. The employer was entitled to enough information to confirm existence of a disability and to understand the employee’s limitations.

  Throughout the Grievor’s leave (more than a year) the employer would have been justified in seeking further clarifying medical information, but eventually the employer ceased doing so.

- **Failure to cooperatively explore accommodations.** The employer acted inappropriately in the face of unrealistic and vague accommodation recommendations from the MD. The employer fixated on those restrictions that undermined any possibility of accommodation, without seeking further clarification from medical experts.

  Despite a frustrating year of contradictory medical evidence, the employer should have continued to work with the union and the MD to explore the Grievor’s condition and possible accommodations.

  The employer failed to prove undue hardship.

  Due to the hostility between the Grievor and management, reinstatement was denied, and damages were awarded.

5. Questions?

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