November 10, 2020
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WELCOME TO TODAY’S
HR/EMPLOYMENT WEBINAR
This program has been approved for 1 hour and 45 minutes of continuing professional development (CPD) hours under Section A of the Continuing Professional Development (CPD) Log of Human Resources Professionals Association (HRPA).

This program has been approved and qualifies for 1 hour and 45 minutes of substantive CPD hours with the Law Society of Ontario.
TOPICS

I. COVID-19 - Legislative Update and Tips to Ensure a Safe Workplace

II. Enforceability of Termination Clauses
   Waksdale v. Swegon North America Inc., 2020 ONCA 391 and

I. Employee’s Entitlement to Bonus and Stock Awards which Vest Throughout the Reasonable Notice Period
   Matthews v. Ocean Nutrition Canada Ltd., 2020 SCC 26 and
   Battiston v. Microsoft Canada Inc. 2020 ONSC 4286

IV. Is an Employer Obligated to Continue Benefit Plan Contributions to an Employee who is off Work due to Disability?
   City of Toronto v. Canadian Union of Public Employees, Local 79, 2019 ONSC 4045
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<th>Time</th>
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<tr>
<td>9:00 a.m.</td>
<td>Opening Remarks</td>
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<tr>
<td>9:05 a.m.</td>
<td>I. COVID-19 - Legislative Update and Tips to Ensure a Safe Workplace</td>
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<tr>
<td>9:25 a.m.</td>
<td>II. Termination Clauses – <em>Waksdale v. Swegon North America Inc.</em> and <em>Sewell v. Provincial Fruit Co. Limited</em></td>
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<tr>
<td>9:45 a.m.</td>
<td>III. Employee’s Entitlement to Bonus and Stock Awards which Vest Throughout the Reasonable Notice Period</td>
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<td>10:05 a.m.</td>
<td>IV. Is an Employer Obligated to Continue Benefit Plan Contributions to an Employee who is off Work due to Disability?</td>
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<tr>
<td>10:25 a.m.</td>
<td>Break</td>
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<td>10:40 a.m.</td>
<td>Q&amp;A Period and Concluding Remarks</td>
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I) COVID-19 – Legislative Update and Tips to Ensure a Safe Workplace
Overview

1. What is COVID-19?
2. How to Prevent Transmission and Spread of Covid-19
3. Timeline of COVID-19 Business Closures in Ontario
4. Re-opening Ontario as of September 2020
5. Stage 3
6. October 2020: Regional Rollbacks to Modified Stage 2
7. November 2020: Colour-Coded Categories
8. Obligations of Employers
9. Public Health Advice and Screening Requirements
10. Tips & Considerations for Businesses
11. United Steelworkers Local 2251 v. Algoma Steel Inc.
12. Working Remotely
13. Refusing to Work
14. Reporting Obligations of Employers
15. Key Employer Takeaways
1. What is the Coronavirus / Covid-19?

The Virus: COVID-19 virus is a respiratory illness that causes infections to the nose, throat and lungs

How Coronavirus Spreads / Ways to catch COVID-19:
• Droplets generated when you cough or sneeze, close, prolonged personal contact such as touching or shaking hands, infected person releasing droplets of infected fluid, and those droplets falling onto surfaces that are then touched
• Being in close proximity or standing within 2 meters of a person ill with Covid-19 can result in transmission and spread of the virus; can catch the virus by breathing in the droplets coughed out or exhaled by infected individuals
• No vaccine or treatment for COVID-19 as of yet – however clinical trials are ongoing
• Early stage vaccine trial results are mixed – latest estimate from US FDA is that vaccine may be available in Spring of 2021
• Pfizer vaccine trials – early data indicates vaccine is more than 90% effective
• The virus affects different people in different ways
1. What is the Coronavirus / Covid-19?

Symptoms

- Most people develop mild to moderate symptoms; some have no symptoms at all
- **Main symptoms include:** Fever (over 37.8 degrees), cough, shortness of breath, loss of taste or smell
- **Other symptoms include:** sore throat, painful swallowing, stuffy/runny nose, headache, nausea, vomiting, diarrhea, feeling unwell, muscle aches, feeling tired
- Individuals with underlying medical conditions, weakened immune systems, diabetes, heart disease, lung disease, and those over 60 years old at higher risk of severe disease and death
- Risk of serious illness increases with age

- Physical distancing by maintaining at least 2 meters of distance from others
- Wear a mask if unable to maintain physical distance – mandatory masking policy is recommended – for employees, clients and visitors
- Staying home is recommended as much as possible, even if you have no symptoms
- Washing your hands regularly for at least 20 seconds is strongly recommended
- Avoiding non-essential travel – Canadian government continues to recommend avoiding any non-essential travel outside of Canada
- Self-isolation for 14 days if have had close contact with someone who is diagnosed with COVID-19, or if have certain symptoms (see COVID-19 Decision Guide for Workplaces - https://www.toronto.ca/wp-content/uploads/2020/10/8dfb-COVID-19-Decision-Guide-for-Workplaces.pdf)
3. Timeline of COVID-19 Business Closures in Ontario

- March 2020: Full lockdown - only businesses deemed to be essential were permitted to remain open (March 13, 2020 – school closures; March 23, 2020 – closure of non-essential businesses announced)
- April 2020: Re-opening plan released – to occur in stages
  - Gradual approach to allow public health officials to monitor and assess conditions before moving onto the next phase – regional basis
  - Not all businesses are permitted to reopen or allowed to reopen in full capacity
  - Objective is to “flatten the curve” and reduce the number of COVID-19 cases and re-open the economy more quickly
- May 2020: Stage 1 Re-opening
- June 2020: Stage 2 Re-opening
- July 2020: Stage 3 Re-opening
- October 2020: Regional rollbacks to modified Stage 2
- November 2020: Colour-coded categories for each health unit
4. Re-opening Ontario as of September 2020:

- All of Ontario entered Stage 3 of Re-opening plan
- Schools re-opened with health measures in place; students given the option of online learning
- Concerts and sporting events with spectators remain restricted
- Government continues to encourage working from home as much as possible
- Mandatory face covering by-laws remain in place in many municipalities (including the City of Toronto) - https://www.toronto.ca/legdocs/bylaws/2020/law0541.pdf
- However, note the stricter requirements in O. Reg 546/20, enacted on October 2, 2020 pursuant to the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17
- Restrictions likely to stay in place until pandemic ends or until vaccine or effective treatment for COVID-19 is available
5. Stage 3

- Most workplaces, businesses and community spaces permitted to open
- Dine-in restaurants & bars, indoor recreational facilities, cinemas, gyms, amusement parks & waterparks – all permitted to open with health and safety measures in place
- Gatherings of up to 50 people permitted indoors; up to 100 outdoors
6. October 2020: Regional Rollbacks to Modified Stage 2

- Due to rising COVID-19 case numbers, in October 2020 Toronto, Ottawa, Peel and York were rolled back to a “modified Stage 2”
- Further rollbacks possible
- **Gathering Limits:** Reduced to 10 people indoors and 25 people outdoors
  - Includes social gatherings, tours, meetings and other events as well as teaching or instruction activities (other than at schools, colleges and universities)
- **Closed:** Indoor food and drink services in restaurants, bars and other establishments (including food courts), indoor gyms, fitness centers, cinemas, performing arts centers, casinos and interactive exhibits or exhibits with high risk of personal contact at museums, science centers, zoos, landmarks or other attractions
- **Prohibited:** Personal care services for which face coverings must be removed, team sports (some training activities still allowed), real estate open houses
7. November 2020: Colour-Coded Categories

1. **Prevent – Green** (standard measures)
   - 25 regions (Waterloo, Windsor)

2. **Protect – Yellow** (strengthened measured)
   - Durham, Halton

3. **Restrict – Orange** (intermediate measures)
   - Similar to modified stage 2
   - Ottawa, Peel, York Region moved out of red zone into orange zone on November 7, 2020
     - Indoor dining and gyms can resume with restrictions, i.e. last call at 9 p.m.

4. **Control – Red** (stringent measures)
   - Similar to modified stage 2
   - Toronto – current restrictions in place until November 14, at which point new colour-coded category system would apply – as of November 14, Toronto likely to be placed in orange category

5. **Lockdown – Grey** (maximum measures)

- Regions are classified based on many criteria, ex. incidence rate per 100,000 people, test positivity rate, hospital and Intensive Care Unit (ICU) capacity and ability of public health units to contact trace
7. November 2020: Colour-Coded Categories

Framework: Adjusting and Tightening Public Health Measures

Act earlier by implementing measures to protect public health and prevent closures

Gradually loosen measures as trends in public health indicators improve

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<thead>
<tr>
<th>Objective</th>
<th>Tactics</th>
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<tr>
<td>PREVENT (Standard Measures)</td>
<td>Focus on education and awareness of public health and workplace safety measures in place. Restrictions reflect broadest allowance of activities in Stage 3 absent a widely available vaccine or treatment. Highest risk settings remain closed.</td>
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<tr>
<td>PROTECT (Strengthened Measures)</td>
<td>Enhanced targeted enforcement, fines, and enhanced education to limit further transmission. Apply public health measures in high risk settings.</td>
</tr>
<tr>
<td>RESTRICT (Intermediate Measures)</td>
<td>Implement enhanced measures, restrictions, and enforcement avoiding any closures. Implement broader-scale measures and restrictions, across multiple sectors, to control transmission (Return to modified Stage 2). Restrictions are the most severe available before widescale business or organizational closure.</td>
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<tr>
<td>CONTROL (Stringent Measures)</td>
<td>Implement widescale measures and restrictions, including closures, to halt or interrupt transmission (Return to modified Stage 1 or pre-Stage 1). Consider declaration of emergency.</td>
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<tr>
<td>LOCKDOWN (Maximum Measures)</td>
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8. Obligations of Employers


- In Ontario, employers have an obligation to maintain a safe working environment.
- Employers are required to show that they acted reasonably to protect the health and safety of employees, including exposure to COVID-19.
9. Public Health Advice and Screening Requirements

• Must comply with Occupational Health and Safety Act


2(1) The person responsible for a business or organization that is open shall ensure that the business or organization operates in accordance with all applicable laws, including the Occupational Health and Safety Act and the regulations made under it.
9. Public Health Advice and Screening Requirements

- Must comply with advice, recommendations and instructions of public health officials


2(2) The person responsible for a business or organization that is open shall operate the business or organization in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

[Emphasis added]
9. Public Health Advice and Screening Requirements

- Must comply with advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health on *screening individuals*.


  2(3) The person responsible for a business or organization that is open shall operate the business or organization in compliance with the advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health on *screening individuals*.

  [Emphasis added]
9. Public Health Advice and Screening Requirements

On September 25, the MOH released the COVID-19 Screening Tool for Workplaces (Businesses and Organizations)


- states that it provides recommendations per O. Reg. 364/20 (presumably also would apply to O. Reg. 263/20)
9. Public Health Advice and Screening Requirements

- **MOH Screening Tool** States that:
  - “Screening should occur before or when a worker enters the workplace at the beginning of their day or shift, or when an essential visitor arrives.
  - At a minimum, the following questions should be used to screen individuals for COVID-19 before they are permitted entry into the workplace (business or organization). This tool may be adapted based on need and the specific setting.
    1. Do you have any of the following new or worsening symptoms or signs? [provides list of symptoms]
    2. Have you travelled outside of Canada in the past 14 days?
    3. Have you had close contact with a confirmed or probable case of COVID-19?
  - If the individual answers YES to any questions from 1 through 3, they have not passed and should be advised that they should not enter the workplace (including any outdoor, or partially outdoor, workplaces).”

[emphasis added]
9. Public Health Advice and Screening Requirements

• Best practice: employees to answer questions on a daily basis and submit electronically to employer; employer to keep record of responses to demonstrate that it has complied with obligations to screen employees

• Toronto Public Health *Guidance for Employers on Preventing COVID-19 in the Workplace*, October 15, 2020

**COVID-19 Decision Guide for Workplaces**

**Daily Screening for Staff**
- Staff must complete a [health screening questionnaire](https://www.toronto.ca/wp-content/uploads/2020/10/8dfb-COVID-19-Decision-Guide-for-Workplaces.pdf) before each shift. The questions can be completed on paper, online or by asking staff directly.
- Screening should occur before or when a worker enters the workplace at the beginning of their day or shift, or when an essential visitor arrives.
- Individuals with chronic symptoms due to a medically diagnosed condition other than COVID-19, should look for new, different or worsening symptoms.

**Symptoms**

- Fever >37.8°C or chills
- Cough
- Difficulty breathing or shortness of breath
- Decrease or loss of taste or smell
- Sore throat, painful swallowing
- Stuffy/runny nose
- Headache
- Nausea, vomiting, diarrhea
- Feeling unwell, muscle aches, tired

<table>
<thead>
<tr>
<th>Close contact with a person who has COVID-19, no symptoms</th>
<th>Close contact with a person who has COVID-19, with symptoms</th>
<th>Travel outside of Canada</th>
<th>Alternative diagnosis from a health care provider that is not related to COVID-19</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not tested or waiting for test</td>
<td>Tested negative</td>
<td>Tested positive</td>
<td></td>
</tr>
<tr>
<td>Pass screening - go to work.</td>
<td>Go back to work if symptoms have been improving for 24 hours.</td>
<td>Self-isolate for 10 days* from the day they were tested. Household members should self-isolate and follow public health advice.</td>
<td></td>
</tr>
<tr>
<td>Self-isolate for 10 days from the day symptoms first appeared. Household members need to self-monitor but may go to work / school.</td>
<td>Self-isolate for 14 days since last exposure to person who has COVID-19. Household members need to self-monitor but may go to work / school.</td>
<td>Self-isolate for 10 days* from the day they were tested. Household members should self-isolate and follow public health advice.</td>
<td></td>
</tr>
<tr>
<td>Self-isolate for 14 days since last exposure to person who has COVID-19. Household members should self-isolate until COVID-19 is ruled out.</td>
<td>Self-isolate for 14 days since last exposure to person who has COVID-19. Household members need to self-monitor, but may return to work / school.</td>
<td>Self-isolate for 10 days* from the day symptoms first appeared. Household members should self-isolate and follow public health advice.</td>
<td></td>
</tr>
<tr>
<td>Self-isolate for 14 days. Household members do not need to self-isolate if they have not travelled, if they don't have symptoms of COVID-19, and if they are not a close contact of a positive case.</td>
<td>Employees with an alternative diagnosis from a health care provider that is not related to COVID-19 can go back to work once their symptoms have been improving for 24 hours. Family members without symptoms should self-monitor, and can go to school or work.</td>
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*If a person was hospitalized, had a severe COVID-19 infection, or has a very weak immune system, they will have to self-isolate for 20 days or longer.

Returning to work
Employees may return to work after the required self-isolation period if they don't have a fever and their symptoms have been improving for 24 hours. Toronto Public Health is not recommending or requiring clearance tests or medical notes for return to work.
10. Tips & Considerations for Businesses

Evaluate if it is necessary for staff to be physically in the office.

– Develop/amend work from home policies.

• Limit in-person meetings.
  – Hold virtual meetings, even where staff are physically present.

• Screen employees before they are permitted to enter the workplace – ex. COVID-19 Decision Guide for Workplaces

• Have a plan if an employee contracts COVID-19 (communication, cleaning, need to close office? – obtain and follow advice from local public health unit

• Identify if any employees are at high risk (pre-existing conditions, over 60) and come up with an individually tailored plan for those employees

• Review human rights policies and ensure compliance with accommodation of persons with disabilities.

• Communicate your plans to employees clearly.
  – Communicate point(s) of contact to employees

• Consider staggered work schedules
10. Tips & Considerations for Businesses

Workplace

- Review guidance for cleaning and disinfecting public areas:  
- Physical distancing signage; e.g. foot and distance markers on floors
- Develop office layouts, waiting areas, and meeting rooms to support physical and social distancing practices.  
  - e.g. raise the height of cubicle walls and spread them further apart.  
  - Remove magazines, pen trays, candy dishes, water jugs, etc. from reception areas.  
  - Limit movement/directional arrows
- Better air quality/circulation – open windows – air filtration system – the virus can be airborne
- Temperature checks
- Take reasonable steps to enforce mandatory mask by-law in public areas of office, if applicable to your company’s jurisdiction – ex. City of Toronto By-Law 541-2020 – post signs
- Consider making masks mandatory throughout entire workplace
2(4) The person responsible for a business or organization that is open shall ensure that any person in the indoor area of the premises of the business or organization, or in a vehicle that is operating as part of the business or organization, wears a mask or face covering in a manner that covers their mouth, nose and chin during any period when they are in the indoor area unless the person in the indoor area,

(l) performs work for the business or organization, is in an area that is not accessible to members of the public and is able to maintain a physical distance of at least two metres from every other person while in the indoor area.
10. Tips & Considerations for Businesses

Workplace

• No handshakes.
• Make hand sanitizer easily available for staff and the public
• Plexiglas barriers to reduce the chances of airborne transmission (ex. reception area)
• Post signage reminding staff and visitors the importance of handwashing.
• Consider closing unnecessary common areas.
• Designate separate entrance and exit doors.
10. Tips & Considerations for Businesses

Conducting Business

• Log the names and contact information for all visitors and all interactions.
• Implement an “order & wait outside” policy.
• Implement appointments and bookings beforehand.
• Require masks.
Employers have obligations to ensure COVID-19 policies do not have discriminatory impact

- *United Steelworkers Local 2251 v. Algoma Steel Inc.*, 2020 CarswellOnt 10068 (Labour Arbitration)
  - Worker lived in United States, worked in Canada
  - Had partial custody of his two young children in United States
  - Under Canada’s Quarantine Act, SC 2005 c 20, everyone entering Canada must self-isolate for 14 days
    - Those who cross border regularly exempt from this requirement
  - Despite exemption, Algoma introduced policy which required 14 day isolation of all its workers who crossed border

Employee had to choose between custody arrangement and working

- Chose not to work; argued discrimination based on family status and violation of layoff and seniority provisions under the collective agreement (other workers who would normally not have been permitted to perform his work as a machinist apprentice were doing so)
- **HELD:** application of policy to worker amounted to discrimination due to family status, in contravention of the *Human Rights Code* (even though arbitrator took no issue with the policy generally)
- Arbitrator suggested that employee could have been required to undergo regular COVID-19 testing, more strict distancing measures and masking rules, avoid COVID-19 “hot spots” in United States
- Arbitrator also noted that US location where employee lived had relatively low rate of COVID-19
- Reminder that accommodation process can result in different solutions for different employees
12. Working Remotely

• Require employees to return to the workplace, or continue working from home?
• Employees have generally been more productive working from home than most employers would have expected
  – Fears of shifting to a work-from-home culture leading to operational chaos and lost productivity have been mostly unfounded.
  – Individual productivity hasn’t slowed down the way many expected – and, in some cases, many employees seem to operating at a higher level.
  – May be more efficient for employer if less office space required

Is the office era over? The surprising truth about working from home
The Globe and Mail, May 29th, 2020

Permanently remote workers seen doubling in 2021 due to pandemic productivity
Reuters, October 22, 2020
13. Refusing to Work

- Employers have the duty to provide a safe workplace.
  - However, an employee cannot refuse to return to work due to a general fear of contracting COVID-19. They must point to something more specific
  - E.g., employer has no social distancing policy, or has the policy but refuses to enforce it, employer refuses to install plexiglass at high traffic reception area etc.

- Possible to accommodate employee? Ex. Install plexiglass. Permit employee to work evenings or nights to avoid close contact with others, etc.

- Employee who refuses to work without a valid legal reason may be found to have abandoned their job
13. Refusing to Work

- Employees cannot decline work or unilaterally decide where or when they will work
- However, employers must consider the following
  - a COVID-19 related leave of absence.
  - entitlement to accommodation pursuant to human rights legislation
  - the right to refuse unsafe work.
- Speak to employees who are refusing to return to work and ask why; determine (with assistance of lawyer) whether the employee is entitled to remain on leave if one of above exceptions applies; if not, explain that the employer could take the position that they have abandoned their job and could also lose entitlement to EI, Canada Recovery Benefit, or other government benefit.
13. Refusing to Work

- Is stress caused by the fear of contracting COVID-19 an acceptable excuse to miss work?
  - *Kidane v. Centro Donne Inc.*, 1997 CarswellOnt 729 (LRB)
    - Complainant counselor’s stress caused by working with clients without OHIP coverage not an excuse to miss work
    - Employee alleged that issues she had to address with clients without OHIP coverage caused her stress that was detrimental to her health
    - Brought reprisal complaint under section 50(1) of *Occupational Health and Safety Act* – argued that employer failed to take reasonable precautions to ensure safe working environment under section 25(2)(h)
    - HELD: Stress itself NOT an excuse to refuse to work; stress is not a “workplace hazard”
    - In order to refuse work actual hazard must be present
    - Is a COVID-19 hazard actually present if employer takes all possible precautions?
14. Reporting Obligations of Employers

- Pursuant to OHSA subsection 52(2), an employer is required to notify the Ministry of Labour if “an employer is advised by or on behalf of a worker that the worker has an occupational illness”
- Subsection 1(1) of the OHSA defines Occupational illness as “a condition that results from exposure in a workplace to a physical, chemical or biological agent to the extent that the normal physiological mechanisms are affected and the health of the worker is impaired thereby and includes an occupational disease for which a worker is entitled to benefits under the Workplace Safety and Insurance Act, 1997”
- Does this include COVID-19?
14. Reporting Obligations of Employers

• If registered with the Workplace Safety and Insurance Board (WSIB), employers have an obligation under section 21 of the Workplace Safety and Insurance Act, SO 1997, c 21 Schedule A (WSIA) to notify the WSIB of an accident to a worker which “necessitates health care or results in the worker not being able to earn full wages.”
  – “accident” defined in section 2 of the WSIA as “disablement arising out of and in the course of employment
  – Does this include contracting COVID-19 at work?
  – **Best practice:** report to WSIB (Form 7) if employee believes that they contracted COVID-19 in the workplace
15. Key Employer Takeaways

- The COVID-19 situation continues to change and further restrictions are possible
- If your business is open, ensure that policies are in place to comply with requirements pertaining to screening employees and maintaining safe work environments
- Develop/amend work-at-home policies and communicate to employees
  - Ensure it is clear to workers whether work-at-home policy is intended to be permanent or temporary
15. Key Employer Takeaways

- Make sure COVID-19 policies are not discriminatory and that they are in compliance with human rights laws *(Algoma Steel)*
- If an employee does contract COVID-19 at work, consult with a lawyer; report to the Ministry of Labour (within 4 days) and/or WSIB; contact local public health unit
- If an employee refuses to return to work consult with a lawyer to determine whether the employee is entitled to remain on leave
- Daily COVID-19 screening of employees – in the interest of safety and compliance
II) Termination Clauses

Waksdale v. Swegon North America Inc., 2020 ONCA 391 and
Sewell v. Provincial Fruit Co. Limited, 2020 ONSC 4406
Enforceability of Termination Clauses and the Latest Blow to Employers

Overview

1. What is a Termination Clause?
2. Why are Termination Clauses Often Struck Down by the Courts?
3. Difference Between Employment Standards Act, 2000 (ESA) & Common Law
5. Application for Leave to Appeal of Waksdale to the Supreme Court of Canada
7. Employer Takeaways
1. What is a Termination Clause?

- 3 relevant considerations when determining employee’s severance package entitlement – employment standards legislation, contract (termination clause) and common law
- Sets out employee’s entitlement upon termination, ex. pay in lieu of notice, severance pay, benefit continuation
- Most termination clauses are drafted in favour of the employer to limit the employee’s entitlement upon termination without cause
- Courts will not enforce a termination clause which breaches the ESA by providing a lesser right or benefit to the employee; or that could breach the ESA
- Common law reasonable notice is usually significantly greater than the employee’s termination entitlements under the ESA
2. Why Are Termination Clauses Often Struck Down By The Courts?

The purpose of the ESA is to provide minimum entitlements and protections for employees.

- Employers and employees are not permitted to contract out of the ESA.
- If the court finds that the contract does not meet the minimum standard, the termination clause will be unenforceable.
- For example, a termination clause that provides (or could provide) for a lesser entitlement with respect to termination pay, severance pay, or benefit continuation than the ESA would be unenforceable.

A termination clause is unenforceable if it COULD shorten the notice obligation of ESA

- For example: the ESA requires employers to give 1 week of notice for every completed year of service up to a maximum of 8 weeks.
- If the termination clause provides for 1 week of notice up to a maximum of only 4 weeks, it would be unenforceable.
2. Why Are Termination Clauses Often Struck Down By The Courts?

- In the employment context, there is usually a significant imbalance of bargaining power
- The employer will likely dictate the terms of the employment contract, rendering the employee vulnerable
- The courts serve as a safeguard for employees to ensure they are not being treated unfairly
- The ESA sets out minimum standards for the protection of employees, upholding which is the job of the courts

Policy considerations (Machtinger v HOJ Industries Ltd.)

- Employment is of central importance to our society.
- Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society.
- A person’s employment is an essential component of his or her sense of identity, self worth and emotional well-being.
- Not only is work important and fundamental to one’s identity, but that the manner in which one’s employment can be terminated (including the employee’s entitlement) are equally important
3. The Difference Between The Employment Standards Act (ESA) and Common Law

- The ESA sets out minimum standards; cannot contract out of ESA
- Why do you need to know about the common law as well?
  - It is the common law rules that will apply if the termination clause is held to be unenforceable
  - Employee entitlements under the common law are significantly greater than under ESA
    - Example: Notice period for termination under common law is capped at 24 months (could be more in exceptional circumstances); under ESA it is 8 weeks
    - This means that if the employer is required to pay damages in lieu of notice, it will be expensive if the common law applies.
3. The Difference Between *ESA* and Common Law

Termination WITHOUT CAUSE - Notice

**ESA**

- generally 1 week per year of service (up to 8 weeks)
- if at least 5 years of service and employer has an annual payroll of $2.5 million, an additional 1 week per year of service - and prorated for partial years (up to 26 weeks)

**Common Law**

- “Reasonable Notice Period”
- Factors: (*Bardal v Globe & Mail Ltd* (1960))
  - Age
  - Length of service
  - Character of employment
  - Availability of similar employment
- Capped at 24 months
3. The Difference Between the ESA and Common Law

Termination WITH CAUSE – Standard

For ESA NOT to apply

- Employee must engage in “wilful misconduct, disobedience or willful neglect of duty”
  - If this high standard is met, employee is not entitled to termination or severance pay

Common Law

- “Just Cause” – lower standard than “wilful misconduct”
  - Criminal activities in the course of employment
  - Dishonesty
  - Misconduct
  - Gross insolence or rudeness to the employer
  - Chronic lateness or persistent or prolonged unjustified absence from work
  - Serious or wilful disobedience
  - Sexual harassment
3. The Difference Between the *ESA* and Common Law

**Termination WITH CAUSE – Standard**

- If the lower common law standard of “just cause” is met, the employee is NOT entitled to notice of termination,
- BUT he or she may still be entitled to termination pay and severance pay under the *ESA*, if higher standard of “wilful misconduct” is not met

- The Court of Appeal court held that in order for a termination scheme in a contract to be enforceable, **all termination provisions must comply with the ESA - including both termination with cause and without cause provisions**

- If part of the termination scheme is unenforceable, it is irrelevant whether there are separate and distinct termination provisions that would be enforceable on their own.

- Unenforceable termination **for just cause** language renders termination **without cause** language unenforceable (even if it otherwise would have been enforceable).

- This applies even if employee was terminated without cause!

- The Termination “With Cause” provision was not set out in the Court of Appeal or trial decision. But the case makes it clear that all provisions of the termination scheme must comply with ESA, or else the entire termination scheme will be unenforceable.

- What is next? Will employees’ lawyers argue that other unenforceable provisions in an employment contract (vacation, benefits, overtime, etc.) should also result in the unenforceability of the termination scheme?
5. Application for Leave to Appeal to the Supreme Court of Canada

**Supreme Court of Canada – Docket**

<table>
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<th>Date</th>
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<td>Swegon North America Inc.</td>
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5. Application for Leave to Appeal to the Supreme Court of Canada

- In order to appeal a decision to the Supreme Court of Canada (SCC), the party wishing to appeal must request and obtain leave (i.e. permission) to appeal.
- Applications for leave are usually decided by the full court.
- The SCC receives around 600 applications for leave each year.
- Leave is granted for approximately 80 cases.
5. Application for Leave to Appeal to the Supreme Court of Canada

• Mandate of Supreme Court of Canada is to deal with issues of law which are
  — of public importance, or
  — of such a nature or significance as to warrant decision by the Court.
• “It is not enough for you to think the Court of Appeal is wrong to have your case heard by the Supreme Court. Matters that the Court hears generally transcend the interests of the immediate parties and do not turn only on the facts of the case. For example, in many of the cases that come before it, the Court must determine the legal meaning of a provision of a statute, and its decision is likely to have an impact on society as a whole.”

5. Application for Leave to Appeal to the SCC

The Public Importance Test

• Set out in s. 40(1) of the *Supreme Court of Canada Act*:

  where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its **public importance** or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it

• The SCC no longer provides reasons for the disposition of leave applications
5. Application for Leave to Appeal to the SCC - TEST

Justice Nesbitt, 1904:
- A matter of Public interest;
- An important question of law; and
- Where provincial legislation may be of general interest across the country.

Chief Justice Dickson, 1983:
“matter of public importance; an issue which goes beyond the interests of the immediate litigants, of interest to Canadians generally.”

Justice Sopinka, 1997:
- Is the question germane to the disposition of the case?
- Is the law unsettled or are the courts below misinterpreting or misapplying a decision of the Court?
- Is there a constitutional or aboriginal issue? and
- Is there a novel point of law?
5. Application for Leave to Appeal to the SCC

Conclusion:

• The SCC has wide discretion whether to grant leave

• An error in law or the general merit of the appeal is not sufficient

• In this particular case it will come down to how well the ‘Public Importance’ has been sold by counsel in their application

Facts:

- Mr. Sewell was fired without cause after 6 months of employment
- He received $4,853.85 – two weeks’ salary and benefits
- He accepted a new position 4 months after his termination
The Clauses

b) Termination by the Company for Just Cause
The Company is entitled to terminate your employment at any time and without any notice or any further compensation for just cause and the Company will not have any further obligations to you whether at contract, under statute, at common law or otherwise.

c) Termination by the Company without Just Cause
(A) The Company will be entitled to terminate your employment at any time without just cause by providing you with the following:

(ii) a payment, or at the Company’s sole option, notice or combination of notice and pay in lieu of such notice representing termination pay and, if applicable, severance pay, as may be required under the Employment Standards Act, 2000, as amended from time to time (the “Separation Period”);

It is agreed that upon compliance with the above provisions, the Company will be release from any and all obligations to you, whether statutory, under contract, at common law or otherwise.
6. **Sewell v. Provincial Fruit Co. Limited, 2020 ONSC 4406**

**ESA Violations:**

- The “without cause” clause combines notice and severance pay entitlements in violation of the ESA requirement to pay both notice and severance.

- The “Termination for Just Cause” provision of the contract was illegal insofar as it contracted around the ESA requirement to provide notice except in cases where an employee engaged in “wilful misconduct.”

  - Recall that the “just cause” standard is lower than the ESA standard of “wilful misconduct” – hence even if there is reason to terminate for “just cause”, there is not necessarily also reason to terminate for “wilfal misconduct”, which means the employee may still be entitled to termination pay and severance pay under the ESA when he or she is terminated for “just cause.”
“Second, applying Waksdale, I find that the “Termination for Just Cause” provision of the contract was illegal insofar as it contracted around the ESA requirement to provide notice except in cases where an employee engaged in “willful misconduct.” Based on the Court of Appeal’s reasoning, I must read the contract as a whole and set it aside if one or more of the terms are illegal, even if the offending term is not at issue in the instant case.”

(Sewell at para. 19)
6. Significance of *Sewell*

- *Waksdale* is here to stay

**Takeaway: Review Your Employment Contracts**

- *Waksdale* has likely rendered many termination schemes unenforceable
- Good time to seek legal advice!
- Have employment contracts reviewed annually
- Consider offering employees an amount greater than ESA but less than common law upon termination without cause
7. Employer Takeaways

Recommended Language To Use: Contractual Fixes

The “Just Cause” Provision Fix:

- The employer may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, with the exception of any entitlements that you may have pursuant to the Employment Standards Act, 2000.
7. Employer Takeaways

Recommended Termination “Without Cause” Language (ESA + 1 Week/Year Of Service)

The employer may terminate your employment in its sole discretion without cause, at any time during the term of your employment by providing you with one (1) week of pay (or one week of working notice) per completed year of service, plus all payments and entitlements (including benefits, if any) in accordance with the standards set out in the Employment Standards Act, 2000, as may be amended from time to time.

You understand and agree that provision of the notice, or pay in lieu of notice, benefit continuance, severance pay and any other payments or entitlements to which you may be entitled under the Employment Standards Act, 2000, plus one (1) week of pay per completed year of service as set out above, shall constitute full and final satisfaction of any claim, right and/or demand that you might have arising from or related to the termination of your employment under statute or common law.

In no circumstances will you receive less than your entitlements pursuant to the Employment Standards Act, 2000.
III) Contracting Out of Bonuses and Stock Awards During Notice Period for Dismissal Without Cause

Battiston v Microsoft Canada Inc.,
2020 ONSC 4286
Matthews v Ocean Nutrition Canada Ltd.,
2020 SCC 26
Contracting Out of Bonuses and Stock Awards During Notice Period for Dismissal Without Cause

Overview

1. Notice Period – Background
2. Pay in lieu of Notice
3. Contracting out of Bonus and Stock Awards During Notice Period
4. Battiston v Microsoft Canada Inc, 2020 ONSC 4286
5. Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26
6. Key Employer Takeaways
1. Notice Period - Background

- Termination **without just cause**, employer required to provide notice to employee
- Length of notice period depends on employment standards legislation, employment contract and common law (if not enforceable termination language in contract)
- *Employment Standards Act, 2000, SO 2000, c 41*
  - Based on length of employment
  - Sets **minimum** amount of notice
1. Notice Period – Background

• Common law factors (*Bardal v Globe & Mail Ltd*, 1960, CarswellOnt 144 (H Ct J))
  – Character of employment
  – Availability of similar employment
  – Length of service of the employee
  – Age of the employee at termination

• Employer can provide pay in lieu of notice
2. Pay in lieu of notice

• Employee entitled to all compensation and benefits that would have been paid if the employee was still employed
• Common law entitlement includes any bonus that was part of the employee’s compensation package, subject to bonus policy or employment contract
• Employers and employees can contract out of the employee’s right to compensation during the notice period, however any clause purporting to do so must be clear and unambiguous
• 2 step test to determine if employee is entitled to a particular bonus during the notice period (See Singer v Nordstrong Equipment Limited, 2018 ONCA 364; Paquette v TeraGo Networks Inc, 2016 ONCA 618)
  – 1) Was the bonus an integral part of the employee’s compensation?
    • Is this an amount that the employee would have received if the employee had not been terminated?
      – May or may not be the case with bonuses based on performance - determine likelihood that the employee would have received the bonus during the notice period
  – 2) Is there something in the bonus plan that unambiguously removes entitlement during the notice period?
3. Contracting out of Bonus and Stock Awards During Notice Period

• Any “harsh and oppressive” terms MUST be drawn to the employees attention or they will not be binding

• Recently considered with respect to stock awards and long term incentive plans
  — Battiston v Microsoft Canada Inc, 2020 ONSC 4286
  — Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26
4. **Battiston v Microsoft Canada Inc, 2020 ONSC 4286**

**Facts**

- Mr. Battiston was employed by Microsoft Canada for almost 23 years
  - In 2013, he was promoted to “Business and Operations Manager – Consulting and Support”, which was the position he held at termination
- In addition to base salary, Battiston received benefits including merit increases, cash bonuses and stock awards which collectively accounted for approximately 30% of his income
  - Stock awards were received by employee and then vested at a later date
- New Director of Operations appointed in 2017
  - Had a strained relationship with Battiston
  - Alleged that Battiston was underperforming
- Battiston terminated without cause in 2018
  - Reasonable notice period determined to be 24 months
  - Unsuccessfully applied to 70 similar positions during notice period
4. *Battiston v Microsoft Canada Inc*, 2020 ONSC 4286

**Issue:**
Was Mr. Battiston entitled to receive stock awards that had not vested prior to termination?

**Contract Provisions**

“Termination of Awardee’s Status as a Participant. ...in the event of termination of Awardee’s Continuous Status as Participant... Awardee’s rights under this Award Agreement in any unvested SAs shall terminate

Awardee’s Continuous Status as a Participant will be considered terminated as of the date Awardee no longer is actively providing services to the Company or a Subsidiary ... Awardee’s right to vest in SAs under the Plan, if any, will terminate as of such date and will not be extended by any notice period”
4. Battiston v Microsoft Canada Inc, 2020 ONSC 4286

• Held:
  
  – 1) the stock awards were an integral part of Battiston’s compensation
     • No question that had he not been terminated he would have received them

  – 2) the Stock Award Agreement unambiguously excluded Battiston’s right to vest his stock awards after he was terminated without cause

• HOWEVER...
4. **Battiston v Microsoft Canada Inc, 2020 ONSC 4286**

- The termination provisions of the Stock Awards Agreements were onerous and not drawn to Battiston’s attention
  - Battiston allegedly did not read the full agreement and was not aware of these provisions
  - Microsoft did not draw these provisions to Battiston’s attention
  - Court followed *Tilden Rent-a-Car Co v Clendenning* (1978) 18 OR (2d) 601 (CA)
- Therefore terms were UNENFORCEABLE
  - Battiston entitled to stock awards that vested during the notice period

Facts

- Employed by Ocean Nutrition since 1997 as a chemist (had unique skills)
  - “deeply invested in his job” SCC at para 10
- New Chief Operating Officer appointed in 2007
  - Strained relationship with Matthews
  - Court found that he acted dishonestly and in bad faith towards Matthews
    - Evidence of “campaign” to marginalize Matthews in the company
    - Resulted in Matthews accepting employment elsewhere in 2011
  - COO’s actions towards Matthews amounted to constructive dismissal

- Appropriate notice period for Matthews was 15 months

- 13 months following his constructive dismissal, Ocean Nutrition was sold for over $540 Million
  - This was a “realizing event” that triggered Matthew’s right to payments under a Long Term Incentive Plan (LTIP)
  - Matthews would have been entitled to about $1.1 Million

LTIP Provision:

ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.
5. Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26

“[The LTIP] does not have any current or future value other than on the date of the Realization Event and shall not be calculated as part of the Employee’s compensation for any purpose, including in connection with the Employee’s resignation or any severance calculation.”
5. Matthews v Ocean Nutrition Canada Ltd, 2020 SCC 26

Held:

– 1) No question that the LTIP was an integral part of Battison’s compensation

– 2) the LTIP provision to exclude payment of LTIP amounts following termination did NOT unambiguously remove Mr. Matthews’ right to compensation

  • Provision stated that it was “of no force and effect if the employee ceases to be an employee of ONC” BUT employment contract not treated as terminated until the notice period expires

• Matthews entitled to LTIP compensation
6. Key Employer Takeaways

• Make sure provisions in employment contracts designed to limit employee’s entitlements to bonuses during the notice period are unambiguous
  – Avoid language such as “when ceases to be an employee”, “actively employed” or “employed full-time”
  – Rather explicitly state that the bonuses (or payment in lieu of bonuses) will not be payable during any notice period to which the employee is entitled in the event of termination without cause
  – Be aware of risk that clause which attempts to limit employee’s entitlement to bonus/incentive payments may not be enforceable

• Draw these clauses to the employee’s attention to before the agreement is signed
  – bold text
  – have the employee initial next to the clauses
  – verbally explain
  – independent legal advice prior to signing contract
  – avoid lengthy “clickwrap” agreements
IV) Is an Employer Obligated to Continue Benefit Plan Contributions to an Employee who is off Work due to Disability?

City of Toronto v. Canadian Union of Public Employees, Local 79, 2019
ONSC 4045
TOPICS

1. *City of Toronto v. Canadian Union of Public Employees, Local 79, 2019 ONSC 4045*

2. Section 51 *ESA* – Rights During Leave

3. The reasoning in *CUPE*

4. General Application of *CUPE*

5. Ontario Human Rights Commission’s Policy

6. Take-Away
1. *City of Toronto v. Canadian Union of Public Employees, Local 79, 2019 ONSC 4045*

Facts:

- Grievor was hired as a full-time caseworker.
- 8 years later, he developed a disability which required him to work fewer days per week.
- Employer accommodated by allowing him to remain in the full-time bargaining unit with access to the full-time employee benefit plan (better benefits than part-time employees), despite a reduction of work days per week.
- 17 years later, after the expiry of the collective agreement, the employer announced that this practice would cease after a two-year transition period.
- As a result, the grievor was placed into the part-time bargaining unit with a less attractive benefits package.
2. Section 51 ESA – Rights During Leave

Rights during leave
(1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.

Benefit plans
(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.

Employer contributions
(3) During an employee’s leave under this Part, the employer shall continue to make the employer’s contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee’s contributions, if any.
2. Section 51 *ESA* – Rights During Leave

S. 51(1) “any leave under this part”

- Pregnancy Leave
- Parental Leave
- Family Medical Leave
- Organ Donor Leave
- Family Caregiver Leave
- Critical Illness Leave
- Child Death Leave
- Reservist Leave
- Domestic or Sexual Violence Leave
- Sick Leave (3 days/year)
- Family Responsibility Leave
- Bereavement Leave
- Emergency Leave

NOT permanent absence/work hour reduction due to disability
3. The reasoning in *CUPE*

- Employers are not obligated to continue full-time benefit contributions to an employee who is working part-time due to disability.

- Employment benefits are paid as ‘compensation’ for work. If an employee does only work part-time – whether due to a disability or otherwise – he or she is not entitled to the added benefits full-time employees enjoy.

- This is not discriminatory treatment. The duty to accommodate disabled employees was not breached.
3. The reasoning in **CUPE**

- The difference in treatment with respect to compensation, which includes benefits, is because of the number of hours worked, not because of disability.

- The duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration.
4. General Application of \textit{CUPE}

- CUPE was decided in the unionized context

- So was the leading case the court relied upon, \textit{Ontario Nurses’ Association v. Orillia Soldiers Memorial Hospital}, 1999 CanLII 3687 (ONCA)

- However, the case interprets provisions of the \textit{Human Rights Code}, which apply in the employment law context (non-unionized employers) as well
5. Ontario Human Rights Commission’s Policy

• From OHRC “Policy and guidelines on disability and the duty to accommodate”:

  Compensation to employees takes on different forms, such as contributions to benefit premiums or accrual of vacation credits. Where employers, as a matter of course, pay a certain form of compensation to other employees who are absent from work, employees absent due to disability are also entitled to such compensation.

  [OHRC Policy and guidelines link]

• Consistent with CUPE and Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital decisions
6. Take-away

- Employers have a duty to accommodate employees with a disability
- Providing employees with a disability “full-time” benefits is not required
- If an employer chooses to provide benefits beyond the legal requirements, it is advisable to clearly specify at the outset how long such voluntary benefits will continue
Thank you.
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