Devry Smith Frank *LLP*
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Marty Rabinovitch

WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

This program has been approved for 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 one hour and 30 minutes of substantive CPD hours with the Law Society of Ontario.

TOPICS

I. **The Re-Opening of the Economy in the COVID-19 Era**
Tips and Considerations for Employers

II. **Reduction or Elimination of Hours and Deemed Infectious Disease Emergency Leave**
O. Reg. 228/20 under the *Employment Standards Act, 2000* – what it means for Employers

III. **Enforceability of Termination Clauses and the Latest Blow to Employers**
Waksdale v. Swegon North America Inc., 2020 ONCA 391

9:00 a.m.	Opening Remarks
9:05 a.m.	**I.** The Re-Opening of the Economy in the COVID-19 Era
9:25 a.m.	**II.** Reduction or Elimination of Hours and Deemed Infectious Disease Emergency Leave
9:45 a.m.	**III.** Enforceability of Termination Clauses and the Latest Blow to Employers
10:05 a.m.	Break
10:15 a.m.	Q&A Period
10:30 a.m.	Concluding Remarks

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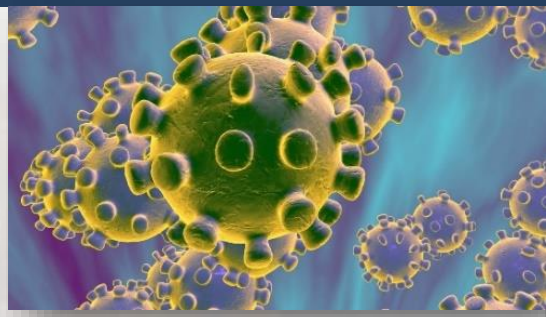
I) The Re-Opening of the Economy in the COVID-19 Era

Tips and Considerations for Employers

The Re-Opening of the Economy in the COVID-19 Era

Outline

1. What is Coronavirus / Covid-19?
2. How To Prevent Transmission And Spread Of Covid-19
3. Reopening Ontario
4. Stage 1: Opening Select Workplaces & Allowing Small Gatherings
5. Stage 1: What Businesses Can Reopen?
6. Stage 1: In What Capacity Can You Reopen?
7. Stage 2: Reopening More Businesses in a Regional Approach
8. Stage 2: What Businesses Can Reopen?
9. Stage 2: In What Capacity Can You Reopen?
10. Stage 3: What Can Reopen?
11. Tips & Considerations for Businesses
12. Working Remotely
13. Configuring Safe Work Spaces
14. Refusing to Work



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

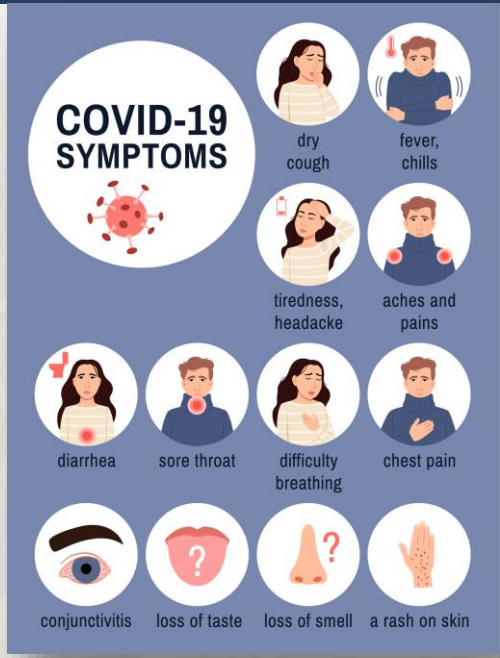
How Coronavirus Spreads / Ways to catch COVID-19:

- 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
- **Oxford University – strong early stage trial results – further results expected in the fall – if successful, vaccine could be approved for limited use by December 2020**
- 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, cough, and shortness of breath
- 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



2. How To Prevent Transmission & Spread of Covid-19

- Physical distancing by maintaining at least 2 meters of distance from others
- **In Stage 3, indoor gathering limits will increase from 10 to a maximum of 50 people, while outdoor gathering limits will increase to a maximum of 100 people.**
- 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 recommends avoiding any non-essential travel outside of Canada
- Self-isolation for 14 days if have symptoms or have had close contact with someone who is diagnosed with COVID-19
- Avoid close contact with others outside 10 person bubble

3. Reopening Ontario

- Ontario has put together a multi-phase plan to reopen the economy.

- 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

- Recall – as of lockdown period in March 2020, only businesses deemed to be essential were permitted to be open

5. Stage 1: What Businesses Can Reopen?

- Construction, retail (with street-front entrance), vehicle dealerships (without mandatory appointment), media industries, hospitals (non-emergency procedures), outdoor recreational amenities (ex. golf courses), individual sports without spectators and some others.

6. Stage 1: In What Capacity Can You Reopen?

The Following Businesses Can Reopen in Stage 1:

Construction: All construction activities, construction projects and related services that support construction activities/projects, including demolition services resume and essential workplace limits lifted; including land surveyors

Retail: No indoor malls, but shops with a separate street-front entrance can reopen

Vehicle Dealerships: Prior to stage 1, all vehicle dealerships were restricted to appointments only

Media Industries: Sound reporting, production, publishing, and distribution businesses, media activities that can be completed while working remotely are encouraged to continue doing so

7. Stage 2: Reopening More Businesses in a Regional Approach

- Ontario announced it will be taking a regional approach to stage 2.
- As of June 2020, Ontario in its entirety has entered stage 2.

8. Stage 2: Reopening More Businesses in a Regional Approach

More businesses and services will be permitted to open – including community, recreational and outdoor spaces, restaurants (outdoor dining), shopping malls (with some restrictions)

Physical distancing measures must still be adhered to, keeping at least two meters from others, but social gatherings of up to 10 people will be permitted. This change applies throughout all of Ontario.

8. Stage 2: What Businesses Can Reopen?

The Following Businesses Can Reopen in Stage 2:

- Restaurants & bars, personal care services, shopping malls and centers, beaches, parks & camping, drive in & drive thru venues, libraries, community centers, along with weddings, funerals and other similar gatherings.

9. Stage 2: In What Capacity Can You Reopen?

The Following Businesses Can Reopen in Stage 2:

Restaurants & Bars: Restaurants, bars, food trucks and drink establishments (i.e. wineries, breweries, distilleries) can reopen for dining in outdoor areas only – such as patios, curbside pickups, parking lots and adjacent premises

- Establishments must take appropriate measures to ensure physical distancing through the use of limiting the number of people allowed in the outdoor space at one time, using reservations and ensuring adequate spacing between tables

Personal Care Services: Can reopen with the proper spacing and health & safety protocols in place. Businesses should consider operating by appointment and or recording each client's name and information for the purpose of contact tracing.

- Restrictions include prohibiting services that tend to a customer's face (i.e. facials, facial hair grooming, eyebrow threading and makeup)

Places of worship will be permitted to reopen in a limited capacity, by limiting attendance to 30% of the building's capacity, while practicing physical distancing.

9. Stage 2: In What Capacity Can You Reopen?

The Following Businesses Can Reopen in Stage 2:

Shopping Malls & Centers: All shopping centers, malls and markets may reopen, however entertainment amenities are not permitted (i.e. movie theatres, waterparks)

- Malls may need to continue policies that were put in place by retail shops that remained open during **Stage 1** – including alternative operating hours, enhanced security, limiting entrances & limiting the number of people in the store at one time. Screening people for COVID-19 symptoms is also recommended at entry points of the shopping center rather than at individual shops.

Weddings, Funerals and Similar Gatherings: Venues not otherwise restricted can reopen to conduct wedding ceremonies, funerals and similar gatherings

Photography: All photography and studio services including commercial and industrial photography can reopen

Film & TV: All film and television production activities will be allowed to resume

9. Stage 2: In What Capacity Can You Reopen?

The following businesses can reopen in Stage 2:

Outdoor Recreational Facilities: Facilities that operate low contact attractions and activities will be allowed to reopen (i.e. golf courses, mini golf, paintball, go karts)
Locker rooms, change rooms, showers and clubhouses will remain closed, except for the extent they provide access to a washroom.

- **Note:** Amusement parks and water parks will remain closed
- Playgrounds, play structures and outdoor fitness equipment will remain closed

Drive in & Drive Thru Venues: Can reopen for a variety of purposes, such as theatres concerts, animal attractions, art installations

Community Centers: Can reopen with limited or modified on-site programs and services. Recreational activities are restricted at indoor facilities, but these spaces can be used for other programs and services (i.e. counselling, education and tutoring).

- Access to locker rooms, change rooms, showers and kitchens is not allowed.

10. Stage 3: What Can Reopen?

Businesses That Can Reopen in Stage 3:

- **Stage 3** will consist of reopening most remaining workplaces, businesses and community spaces while carefully and gradually lifting restrictions (i.e. dine-in restaurants & bars, indoor recreational facilities, cinemas, gyms, amusement parks & waterparks – all with health and safety measures in place)
- **Gatherings of up to 50 people permitted indoors; up to 100 outdoors**
- Concerts and sporting events with spectators likely to be restricted for the foreseeable future.
- Restrictions likely to stay in place until pandemic ends or until vaccine or treatment for COVID-19 is available.
- Government encourages working from home as much as possible **in all 3 stages**

11. Tips & Considerations for Business to Adopt

- **follow Public Health Recommendations**
- **be proactive**

***Occupational Health and Safety Act*, RSO 1990, c. O. 1 ("OHSA")**

- 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.
- Objective is to "flatten the curve" and reduce the number of COVID-19 cases and re-open the economy more quickly

11. Tips & Considerations for Businesses

Evaluate if it is necessary for staff to be physically in the office.
  - Develop work from home policies.
- Limit in-person meetings.
  - Hold virtual meetings, even where staff are physically present.
- Encourage employees to monitor themselves for symptoms.
  - Consider screening staff before they are permitted to enter workplace – temperature checks?
- Have a plan if an employee contracts COVID-19 (communication, cleaning, need to close office?)
- 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

11. Tips & Considerations for Businesses

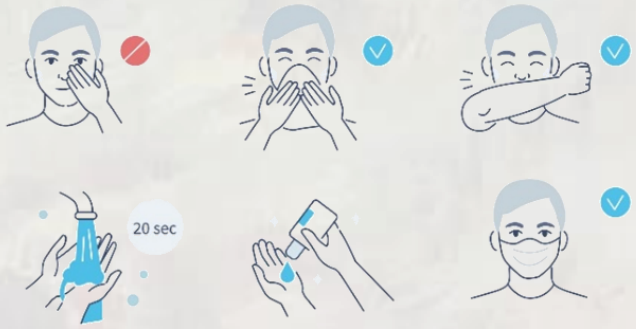
Workplace

- Review guidance for cleaning and disinfecting public areas:
  https://www.publichealthontario.ca/-/media/documents/ncov/factsheet-covid-19-environmental-cleaning.pdf?la=en
- 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

11. 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.



11. Tips & Considerations for Businesses

<u>Conducting Business</u>

- 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.**
  - As of July 6, 2020, under the City of Toronto By-Law 541-2020, wearing a facemask or face covering is required in indoor public spaces.
    - other jurisdictions have followed suit as well; *e.g.* Peel Region, York Region.
    - **But there are exceptions – i.e. the Toronto by-law does not make masks mandatory at schools, post-secondary institutions, child care facilities, private and public transportation, hospitals, independent health facilities and offices of registered health professionals – these institutions could require masks, subject to human rights legislation and other legal and professional duties (ex. Can a physician refuse to provide care to a physician at their office if they refuse to wear a mask?)**

11. Tips & Considerations for Businesses

- Health and safety will likely win when **balanced** against the inconvenience of wearing a mask (subject to human rights issues).
- Ask visitors who are not wearing a mask to put one on; deny entry unless there are unable to wear a mask for medical reasons (ex. Respiratory disorder – limited lung capacity) – must comply with human rights legislation

12. Working Remotely

- Require employees to return to the workplace, or continue working from home? Benefit to employer from employee working in the office, vs. health and safety benefits of staying 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.

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

12. Working Remotely

- Reduce office space to save operational costs for employer? Can some employees continue to work from home on a full-time or part-time basis?
  - "If you can run a tight ship without all the fuss and expense of a ship, why not sell the ship (or at least a couple decks)?"
  - "As a rule of thumb, to have an employee come into the office, it costs about 20 per cent of their salary. Even if employees are 5-per-cent less effective [when working from home], that's still a better return on investment."

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

13. Configuring Safe Work Spaces

- There may be complex logistical considerations.
  - January study concluded that a customer at a restaurant in Guangzhou, China infected 9 others with COVID-19. The restaurant's air-conditioners apparently blew the virus particles around the dining room.
  - Ventilation systems can create complex patterns of airflow and keep viruses aloft, so simply spacing tables six feet apart may not be sufficient to safeguard restaurant patrons.
- Businesses will need to be mindful of the direction of airflow and **adapt to new lessons about configuring safe work spaces**.

How Coronavirus Infected Some, but Not All, in a Restaurant
The New York Times, April 20th, 2020

14. 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

14. 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 CERB benefit

II) Reduction or Elimination of Hours and Deemed Infectious Disease Emergency Leave

O. Reg. 228/20 under the *Employment Standards Act*, 2000 – what it means for Employers

II) Deemed Infections Disease Emergency Leave

Overview

1. Background on Temporary layoffs
2. S. 56(2) of the Employment Standards Act – Temporary lay-off
3. New Developments due to Coronavirus
4. Introduction to O. Reg. 228/20: Infectious Disease Emergency Leave
5. No Statutory Constructive Dismissal
6. When Hours are Considered Reduced
7. When Wages are Considered Reduced
8. Common Law Constructive Dismissal Not Altered
9. Reconciliation Difficulties in the Law
10. Key Employer Takeaways

1. Background on Temporary Layoffs

- **At Common Law**
  - Employers have **no common law right** to temporarily lay off employees.
    - Employer only has the right where the term exists in the employment contract.
    - Otherwise, employees have the right to claim for constructive dismissal:
      - ***Employment Standards Act, 2000*, s 56(2)**
  - Employers **may** temporarily lay off employees.
    - Rules must be followed (see next slide).
    - Length of the layoff is variable; longer if employer continues to contribute to employee's benefit plan, for example

2. s 56(2) Temporary Lay-off

- For the purpose of clause (1)(c), a **temporary layoff** is,
  - a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
  - b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
    - i. the employee continues to receive substantial payments from the employer,
    - ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
    - iii. the employee receives supplementary unemployment benefits,
    - iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
    - v. the employer recalls the employee within the time approved by the Director, or
    - vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or
  - c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

2. s 56(2) Temporary Lay-off

- If a temporary-lay off runs longer than 13 weeks in any period of 20 consecutive weeks it is considered a deemed termination.
  - Employee would be entitled to termination pay and severance pay.
  - A longer layoff of up to 35 weeks in a period of 52 consecutive weeks is permitted if certain criteria are met.

3. New Developments due to Coronavirus

- Coronavirus required many businesses to terminate or temporarily lay-off employees
  - In May, Ontario passed Regulation 228/20 under the *Employment Standards Act*.
  - By June, approximately 2.2 million Ontario employees had either lost their jobs or had their hours significantly reduced

4. Introduction to O. Reg. 228/20:
Infectious Disease Emergency Leave

- **Temporary Rules:**
  - Non-unionized employees whose employer has temporarily reduced or eliminated their hours of work because of COVID-19 is deemed to be on **Job-Protected** Infectious Disease Emergency Leave.
  - Affected workers will remain employees and continue to be eligible for federal emergency income support programs.
  - Limited timeline of applicability ("The COVID-19 Period"):
    See: O. Reg. 228/20, s 1

5. No Statutory Constructive Dismissal

- During The COVID-19 Period…
  - Temporary reduction or elimination of an employee's **hours** or **wages** by the employer for reasons related to COVID-19 shall not constitute a constructive dismissal.
    See: O. Reg. 228/20, s 7.
  - An employee complaint filed with the Ministry in response to a constructive dismissal is deemed not to have been filed.
    See: O. Reg. 228/20, s 8.

6. When Hours are Considered Reduced

- Hours of work are considered reduced:
  - If regular work week hours are fewer than the last regular work week prior to March 1, 2020, or
  - Where no regular work week, if hours worked are less than the average hours worked over twelve weeks prior to March 1, 2020, or
  - Where not employed during the entire work week immediately preceding March 1, 2020, if the employee works fewer hours in the work week than they worked in the work week in which they worked the greatest number of hours.
  - See: O. Reg. 228/20, s 9(1).

7. When Wages are Considered Reduced

- Wages are considered reduced:
  - Wages earned are less than those earned on the last regular work week prior to March 1, 2020, or
  - Where no regular work week, if wages earned are less than the average wages earned over twelve weeks prior to March 1, 2020, or
  - Where not employed during the entire work week immediately preceding March 1, 2020, if the employee earns less regular wages than they did in the work week in which they earned the most regular wages.
  - See: O. Reg. 228/20, s 9(2).

8. Common Law Constructive Dismissal Not Altered

- At common law, employers have no right to temporarily lay off employees.
  - No language in O. Reg. 228/20 expressly alters this right, as is typical when altering a common law right; the right may not actually be displaced.
  - Section 8 of ESA – "Subject to section 97 [unrelated], no civil remedy of an employee against his or her employer is affected by this Act."
    - How the Court will interpret and apply O. Reg. 228/20 remains to be seen.
      - Courts may still find employees have been constructively dismissed at common law, but award less generous severance packages.

9. Reconciliation Difficulties in the Law

- It may be difficult for courts to reconcile how an employee could be on unpaid leave under the *Employment Standards Act*, but constructively dismissed under the common law.
- But similar to temporary layoffs – courts have accepted than an employee can be on temporary layoff pursuant to ESA but constructively dismissed at common law
  - How this issue will be resolved remains uncertain.

Common Law Constructive Dismissal (Not Altered)

No Statutory Constructive Dismissal: Infectious Disease Emergency Leave

10. Key Employer Takeaways

- Employers may reduce or eliminate an employee's hours or wages for reasons related to COVID-19 without being obligated to pay out severance and termination pay under the *Employment Standards Act*.
  - However, if an employee has already been given a written notice of termination between March 1, 2020, and May 29, 2020 (date on which regulation was enacted), they will not automatically deemed to be on infectious disease emergency leave – the employee would remain terminated
- Employees will likely not be barred from pursuing a civil action against the employer under the common law for constructive dismissal as a result of the regulation
- The applicability of these temporary rules expires six weeks after the state of emergency ends.

III) Enforceability of Termination Clauses and the Latest Blow to Employers

Waksdale v. Swegon North America Inc., 2020 ONCA 391

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. The Difference Between *Employment Standards Act* (ESA) & Common Law (Different Thresholds)
4. Prior Law: *Khashaba v. Procom Consultants Group Ltd.*, 2018 ONSC 7617
5. Prior Law: *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605
6. New Law: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391
7. New Law: *Rutledge v. Canaan Construction*, 2020 ONSC 4246
8. Significance of *Waksdale*
9. Employer Takeaways

1. What is a Termination Clause?

- 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.

- 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, in the view of the court, an employer is seeking to provide the employee with less than their minimum entitlements under the ESA upon termination, the termination clause will be unenforceable.
- For example, a termination clause that provides 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 provide less notice than the 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?

- Fails to provide for employer benefit plan contributions to continue throughout the statutory notice period

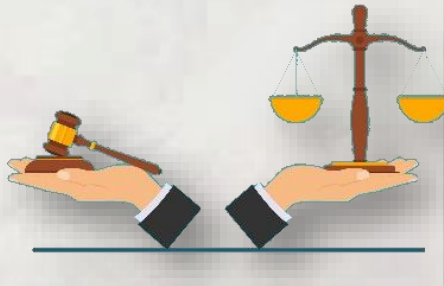
- See *Wright v. Young & Rubicom Group of Cos.,* 2011 ONSC 4720 (Superior Court)
  Stevens v. Sifton Properties Ltd., 2012 ONSC 5508 (Superior Court)
  Wood v. Fred Deeley Imports, 2017 ONCA 158

2. Why Are Termination Clauses Often Struck Down By The Courts?

A termination clause is unenforceable if it is unclear, confusing, vague or ambiguous.

- **For example:** "employee is entitled to minimum notice upon termination"

- If no termination clause, employee would be entitled to common law reasonable notice upon termination without cause



2. Why Are Termination Clauses Often Struck Down By The Courts?

The Supreme Court of Canada & Employee Vulnerability under Employment Contracts

- SCC has emphasized the need for the common law of employment contracts to develop with consideration of the inherent vulnerability of employees – perhaps most evident in cases relating to termination of the employment contract.

In ***Machtinger v HOJ Industries Ltd***. the Court referred to policy considerations that ought to influence judges when interpreting employment contracts and made the following observations:

- 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) & Common Law (Different Thresholds)

Employment Standards Act: WITHOUT CAUSE

The *Employment Standards Act* ("*ESA*") sets out an employee's statutory minimum entitlements

If an employee is terminated <u>without cause</u> the employee is entitled to termination pay and may be entitled to severance pay

- Termination Pay, s.57: generally 1 week per year of service (up to 8 weeks)
- Severance Pay, s. 65: 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) – ex. 6.5 years of service = 6.5 weeks of severance pay

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT

The *ESA* sets out the employee's minimum entitlements

- The standard to deprive an employee of ESA entitlements upon termination is extremely high and requires "wilful misconduct, disobedience or wilful neglect of duty"
- O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT

TERMINATION OF EMPLOYMENT

Employees Not Entitled To Notice Of Termination Or Termination Pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

(...)

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

SEVERANCE OF EMPLOYMENT

Employees Not Entitled To Severance Pay

9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

In order to prove wilful neglect of duty disentitling an employee to notice of termination or pay in lieu, the employer must establish that the employee "**consciously** did something or omitted to do something that can be described as serious and wilful neglect of duty"

- (*Exeter Machine Products (1995) Ltd. v. MacDonald*, 2004 CanLII 17789 at para 15 (ON LRB))

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

'The "misconduct" or "neglect of duty" referred to in the Act is referred to as "wilful".

- Therefore, it is not sufficient to merely show that an employee was indifferent, casual, thoughtless or neglectful in the performance of, or in the omission to perform, his or her duties or responsibilities.
- Acts or omissions must deliberate or intentional acts
- Employee must consciously and deliberately engage in some positive act of misconduct or deliberately refrain from performing duties or responsibilities that he or she was required to perform.
- (*Rea International Inc o/a Altas Fluid Systems*, 2010 CanLII 67923 at para 38 (ON LRB))

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

"There are two general categories of **serious misconduct**.

- **Single Acts:** insubordination, theft and dishonesty, and physical violence against other employees, may standing on their own, meet that standard of seriousness.
- Less serious repetitive forms of misconduct, if handled properly by the employer, will also meet this standard of seriousness.
  - The employer, in this scenario, must have explained to the employee after each occurrence that the conduct in question was not acceptable and that if continued would result in termination (warning system)

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

In addition to proving that the misconduct is serious, the employer must demonstrate, and this aspect of the standard and conduct complained of is **'wilful'**.

- Careless, thoughtless, heedless or inadvertent conduct does not meet the standard.
- The employer must show that the misconduct was intentional or deliberate.
- The employer must show that the employee purposefully engaged in conduct and that he or she knew to be serious misconduct.

VME Equipment of Canada Ltd, [1992] OESAD No 230

3. The Difference Between the Employment Standards Act (ESA) & Common Law (Different Thresholds)

Common Law: JUST CAUSE

Where an employment contract does not limit an employee's entitlements upon termination (or where there is no employment contract), an employee is entitled to a common law notice period

- factors as set out in ***Bardal v Globe & Mail Ltd*** (1960), 24 DLR (2d) 140 (Ont HC), at p. 145:
    - Age
    - Length of service
    - Character of employment
    - Availability of similar employment

An employee terminated for "**just cause**" under the common law is **not** entitled to common law reasonable notice but **may** still be entitled to termination pay and severance pay under *ESA*

3. The Difference Between The Employment Standards Act (ESA) & Common Law (Different Thresholds)

Common Law: JUST CAUSE

Common law standard for "just cause" is lower than the ESA standard for "willful misconduct, disobedience or wilful neglect of duty"

Employees can be terminated for just cause for:

- Criminal activities in the course of employment
  - (see Meszaros v Simpsons-Sears Ltd (1979), 19 AR 239 (Alta QB));
- Dishonesty
  - (see McKinley v BC Tel, [2001] 2 SCR 161 at paras 48-49);
- Misconduct
  - (see Fernandes v Peel Educational & Tutorial Services Ltd., 2016 ONCA 468 at paras 103-05);
- Gross insolence or rudeness to the employer
  - (see Clare v Moore Corp (1989), 29 CCEL 41 (Ont Dist Ct));
- Chronic lateness or persistent or prolonged absence from work (provided it is not justified time off for a medical issue)
  - (see Cardenas v Canada Dry Ltd (1985), 10 CCEL 1 (Ont Dist Ct));
- Serious or wilful disobedience
  - (see Byer v Himark Enterprises Inc (1998), 39 CCEL (2d) 203 (Ont Gen Div); affirmed (1999), 128 OAC 247 (Ont CA))
- Sexual harassment
  - (see Simpson v Consumers' Assn of Canada (2001), 13 CCEL (3d) 234 (Ont CA); leave to appeal refused (2002), 2002 CarswellOnt 2653 (SCC))

4. Khashaba v. Procom Consultants Group Ltd., 2018 ONSC 7617 – Old Law

Overview: At issue was a termination clause that had several different sub -paragraphs dealing with possible scenarios for contract termination (i.e. dismissal for cause, dismissal without cause & resignation).

- The employment agreement "contained a termination "For Cause" provision which the employee argued violated the entitlements under the ESA.
- The employee took the position that this should render the entire termination clause as void and unenforceable, arguing common law notice should be applicable.
- The employer argued that the employment contract contained a severability clause, in which the provisions and terms of the clause should be read separately as stand alone terms
  - Employer took the position that the termination "Without Cause" provision should still be enforceable as it complies with the ESA.

Outcome: The Court held that non-compliance with the ESA in one of the termination clauses does NOT void the entire employment agreement

- That the remainder of an agreement's clauses, including a separate termination "Without Cause" provision – remained enforceable.

4. Khashaba v. Procom Consultants Group Ltd., 2018 ONSC 7617 – Old Law

Early Termination Clause – Language Used in Contract

Termination "For Cause" Provision

Procom may, at its option, terminate your employment immediately for cause, without prior written notice or compensation of any nature. For these purposes, "cause" means any grounds at common law for which an employer is entitled to dismiss an employee summarily without notice or compensation in lieu of notice.

4. Khashaba v. Procom Consultants Group Ltd., 2018 ONSC 7617 – Old Law

Early Termination Clause – Language Used in Contract

Termination "Without Cause" Provision

Notwithstanding the fixed Term of this Agreement, Procom may terminate your employment without cause at any time by providing you with only the minimum amount of notice of termination or pay in lieu thereof (at the Company's sole discretion, in any combination), minimum benefits continuation (if applicable), and minimum severance pay (if applicable), as required by the Employment Standards Act, 2000, as well as accrued wages and vacation pay up to an including the date of termination. In no event will you receive less than your minimum entitlements under the Employment Standards Act, 2000. If a greater entitlement is required under the Employment Standards Act, 2000 than this provision grants you, your entitlements shall automatically be increased to satisfy only the minimum entitlements required by the Employment Standards Act, 2000 on the termination of your employment. You understand and agree that the entitlements set out in this paragraph will constitute your full, exclusive and final entitlements to notice or pay in lieu of notice, severance pay (if applicable), and benefits continuation (if applicable), including in the event of a constructive dismissal and including any entitlements to common law notice and by your acceptance of this Agreement waive any further other claim at common law relating to such termination.

4. Khashaba v. Procom Consultants Group Ltd., 2018 ONSC 7617 – Old Law

Meaning: The termination "For Cause" provision was void as it was contrary to the *ESA* – however the remaining provisions within the clause were valid and enforceable

Old Law (No Longer Relevant)

Takeaway Proposition from *Khashaba*: If a provision is invalidated, only the illegal provision is void and the rest of the contract remains in force

- The determination of validity is assessed on a clause-by-clause basis (instead of for the contract as a whole)

5. Groves v. UTS Consultants Inc., 2019 ONSC 5605

Facts: In Groves v UTS Consultants Inc., the Plaintiff, Wayne Groves ("Mr. Groves") founded the Defendant Company, UTS Consultants Inc. ("UTS") in 1992.

- In November of 2014, Mr. Groves sold all of his shares to Oakville Enterprise Corporation ("OEC").
- He resigned from his position as a director and officer, was rehired the follow day and continued working there as a senior manager for UTS until he was terminated without cause in 2017.
- Mr. Groves signed a new employment agreement with UTS upon selling his shares to OEC in November of 2014.

- The new employment agreement Mr. Groves signed contained a termination clause, which stated that Mr. Groves' notice period was limited to a range of between 3-12 months and that "any prior service is excluded and you hereby waive and release any prior service entitlements".
- Upon termination, Mr. Groves rejected UTS's termination offer, arguing it failed to comply with the ESA.

5. Groves v. UTS Consultants Inc., 2019 ONSC 5605

Issue:

(1) Whether the termination clause of the employment agreement was compliant with the Employment Standard Act (ESA)?

(2) If the termination clause of the employment agreement failed to comply with the ESA, did the **saving clause** allow the termination to be enforced and thus save the contract from being declared void?

Employment Standards Act

Section 5(1) of the ESA states no employer shall contract out of an employment standard and any such contract is void.

5. Groves v. UTS Consultants Inc., 2019 ONSC 5605

POSITION OF PARTIES:

Employee's Position

- One of Mr. Groves' arguments was that the termination clause failed to comply with the *Employment Standards Act* ("the *ESA*") on the basis that **the termination clause permitted termination without notice for <u>just cause</u>, as opposed to the *ESA* standard of <u>wilful misconduct</u>**

- Court did not explicitly address this issue, but noted distinction between just cause at common law and wilful misconduct under ESA

5. Groves v. UTS Consultants Inc., 2019 ONSC 5605

Analysis & Decision

Saving Clause:

- The Court addressed UTS' argument that the termination clause contained a saving provision.
- The saving provision stated that *"notwithstanding the foregoing, the Company guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance provisions of the Employment Standard Act (Ontario)."*

Decision: The Court, relying on **Rossman v Canadian Solar Inc., 2018 ONSC 7172** stated, "when the employer has sought to contract out of the ESA, **a saving provision cannot be used to rewrite the express language in an agreement to cause it to comply"**.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

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

- 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!

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

- Where part of a termination scheme is deemed unenforceable on the basis of violating the ESA, the existence of a **severability clause** will NOT be applied to sever the offending terms.

Result: employee entitled to common law reasonable notice

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

Facts: Benjamin Waksdale (W) (employee) was terminated without cause and brought an action alleging wrongful dismissal against his employer, Swegon North America Inc. (SNA) claiming 6 months of reasonable notice for his 8 months of employment.

- W was 42 years old, and held the position of Director of Sales, and earned total annual compensation of approximately $200,000. He had 9 months of service. He was terminated "without cause".

- His employment agreement with SNA contained two separate provisions for terminating the employment relationship, (1) a Termination "**With Notice" provision** and (2) a Termination "**For Cause" provision**.
- The employment contract also contained a **severability clause** that indicated if any single term within the contract is found to be void and unenforceable, that the rest of the contract nevertheless remains valid and enforceable

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

Argument: The employee argued that the defective termination "For Cause" provision impacted the entire employment agreement – and rendered both termination clauses void and unenforceable.

- **Parties agreed that that the termination for just cause language was unenforceable**

Issue: How much notice of termination was the employee (W) entitled to receive?

Analysis: The contract contained two clauses relating to termination of the employment contract along with a severability clause

1. A "Termination With Notice" provision.
2. A "Termination For Cause" provision.
3. Severability Clause

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

The Termination "With Notice" provision stated that Waksdale would receive the minimum amount of notice and statutory severance pay required by the ESA, plus an additional one week's notice or pay in lieu.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

Termination of Employment with Notice

- *You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the Employment Standards Act 2000 as amended. All reimbursement for business expenses shall cease as of the date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not as yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.*

Employer provided (W) two weeks of pay – one week required by the ESA notice provisions plus one additional week as per the termination with notice provision.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

The Termination "For Cause" provision included a long list of grounds that would constitute grounds for termination "For Cause" & without notice – indicated that wages and benefits would cease as of the date of termination.

Deemed Unenforceable: At trial, the Employer "conceded that this clause violated the ESA and is unenforceable", but argued that this fact did not matter because (W) was terminated "With Notice" and therefore this clause is inapplicable.

Language of termination for cause provision not quoted in either trial or Court of Appeal decision.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

Lower Court Decision

The employer conceded that the "For Cause" provision was void and unenforceable.

- However, employer argued that since they had not alleged termination for cause, they could still rely on the termination "With Notice" provision.
- The motion judge agreed holding that the "With Notice" provision was stand-alone, unambiguous, and enforceable term.
- Additionally, the court stated that the contract contained a severability clause which acted as a safety net excising if any term ran afoul of employment standards.
- Followed reasoning in ***Khashaba***

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

The Ontario Court of Appeal – Overturns Lower Court Decision

Decision: The Termination Provisions are Void

On appeal, the ONCA overturned the motion judge's decision.

- The court held that the correct analytical approach when assessing termination provisions "is to determine whether the termination provisions in an employment agreement violate the ESA when read as a whole".
- As a matter of policy, the court stated the employer receives a tangible benefit where they include illegal provisions in the contract, as employees unfamiliar with their rights will strive to comply with their contractual obligations.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

The Ontario Court of Appeal – Overturns Lower Court Decision
Decision: The Termination Provisions are Void

Unenforceable: The court held that the illegality of the "For Cause" termination provision rendered the "With Notice" termination provision unenforceable.

In arriving at this conclusion, the Court emphasized two guiding principles regarding the interpretation of termination clauses in employment contracts

1. That the ESA is a remedial legislation intended to protect the interests of employees
2. That termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

The Ontario Court of Appeal – Overturns Lower Court Decision

In Overturning The Lower Court's Decision – The ONCA Made Important Determinations

1) It is irrelevant whether the termination provisions are contained in one paragraph or as part of separate and distinct clauses.
   - If any part of a termination clause violates the ESA, all of its provisions are rendered void and unenforceable by statute.
2) Every termination clause must be evaluated by its wording at the outset of the employment relationship.
   - The manner in which the employee is terminated plays no part in assessing the validity of the termination clause.
3) A **severability clause** cannot save a defective termination clause that has been rendered void by statute.

6. Waksdale v Swegon North America Inc., 2020 ONCA 391

Reasoning: The Court reasoned, citing ***Wood v. Fred Deeley***

Wood v. Fred Deeley

1. The ESA is remedial legislation that is to be interpreted broadly so as to protect as many employees are possible.
2. The law should encourage employers to draft termination clauses that will always comply with the ESA termination requirements.
3. The test is whether the termination provisions could conceivably permit termination that violates the ESA, not whether the employer actually does violate the ESA at the time of the termination.
4. The power imbalance between employers and employees that should lead courts to hold employers to a high standard of contract drafting.

7. *Rutledge v Canaan Construction*, 2020 ONSC 4246

Takeaway: Even a remote possibility that a contract might become illegal in the future voids the *ESA* Termination Clause.

- In this case, a construction employee's contract stated he was NOT entitled to *ESA* termination pay.
- However, this clause was found to be **illegal**: at some point in the future he might have become an employee not exempt from termination pay.
- Even if in compliance at the time, it is *still* invalid.

8. Significance of Waksdale

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

9. Employer Takeaways

- Termination clauses within employment contracts that seek to give employees only their minimum entitlements under the ESA have a greater risk of being found unenforceable.

- What will be the next problem that the courts find with termination clauses which seek to limit an employee's entitlement to their ESA minimums?

9. 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.***

9. Employer Takeaways

Recommended Termination Without Cause Language (ESA + 1 Week Per 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.

Thank you

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