LABOUR & EMPLOYMENT LAW NEWSLETTER

Quarterly Update for CEOs, HR Managers, Corporate Executives and In-House Counsel on the Latest Developments in HR and Employment Law

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ABOUT US

Soloway Wright LLP's Employment Law Group provides legal advice to employers and employees on all issues of human rights, labour and employment law

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DID YOU KNOW THAT CURRENTLY…?

- You can require that an employee who claims to be sick or disabled submit to an independent medical examination, by an independent doctor of your choosing, if his/her employment contract so provides. Alternatively, even if the contract does not do so, you can still require an independent medical examination if there is a reasonable and bona fide reason for questioning the adequacy and reliability of the medical information provided by the employee's doctor;
- It is extraordinarily difficult to sue employers for anything they write in a reference letter; over the past 100 years, there have been no reported cases in Canada where such lawsuits have been successful;
- It is contrary to the *Employment Standards Act,* and therefore illegal, to dismiss an employee who claims overtime pay for *unauthorized* overtime work;
- When an employee owes your company money, it is illegal for you to deduct the debt from his/her wages, severance pay and/or statutory termination pay unless he/she has given you written authorization or you have received a court order to do so;
- When you arrange for one of your current employees to sign a new and revised employment agreement, that agreement is generally unenforceable unless you have given that employee fresh and improved financial consideration in exchange for his/her signing the new agreement;
- It is generally illegal for you to place an employee on unpaid temporary layoff unless he/she agrees to this or unless his/her employment agreement contains a 'temporary layoff' clause explicitly permitting such layoff;
- When you terminate the employment of an employee who is on disability leave, you may not ordinarily deduct the future disability benefits which he/she will be earning during the notice period from the pay in lieu of notice which you owe to him/her;
- However, you may ordinarily deduct future workers compensation benefits from the pay in lieu of notice that you owe to him/her (but not from the statutory termination pay and severance pay that you owe him/her).

QUEENS PARK UPDATE:

The Most Important New Statutory And Regulatory Changes So Far This Year

Bill 148 - *The Fair Workplaces, Better Jobs Act, 2017*

This year, the Ontario Government is overhauling and amending, with great public fanfare, many sections of the *Employment Standards Act* and the *Labour Relations Act*.

Those amendments represent the most revolutionary modifications to Ontario employment law in many years.

The Ontario Legislature has not yet passed the Bill, but is expected to do so sometime this Fall. When the Bill becomes law, it will impact employers in the following important ways:

- The minimum wage that employers must pay their employees, which is already set to increase from $11.40 per hour to $11.60 per hour on October 1, 2017, will increase to $14.00 per hour as of January 1, 2018 and to $15.00 per hour as of January 1, 2019;
- Employers will henceforth have to provide a minimum of 3 weeks' paid vacation to any of their employees whom they have employed for 5 or more years;
- Employees will gain the right to request a review of their wages to ensure that they are receiving equal wages for equal work (Some exceptions apply where their pay is based on seniority or quality of production);
- Henceforth, employers must pay all on-call employees a minimum of 3 hours' wages for each 24 hour period that they are on call, *even if they never call the employee into work*;
- Whenever an employer cancels an employee's shift on less than 48 hours' notice, it must pay the employee a minimum of 3 hours' wages;
- In addition, all employers will have to pay their employees a minimum of 3 hours' wages whenever they report to work, even if they are subsequently sent home early without having worked the full 3 hours;
- All employees who have worked for 3 months or more will gain the right to request schedule changes;
- All employees will be empowered *to refuse* shifts if given less than 4 days' notice of such shifts;
- All employers, regardless of size, will have to give their employees at least 10 personal emergency leave days, *at least 2 of which will henceforth have to be paid leave days*;
- In addition, employers will be prohibited from requiring their employees to provide sick notes when they take any of that personal emergency leave;
- Employees will also be entitled to increased family medical leave (henceforth 27 weeks per year rather than the current 8 weeks per half-year);
- In addition, employers will have to provide their employees with new leaves of absence if ever they lose a child or are the victim of domestic violence or sexual assault;
- Temporary Help Agencies will be required to pay their temporary help workers the same wages as those paid to the permanent employees of the host client, where they work, when doing the same job as those employees;
- Temporary Help Agencies will also be required to provide additional notice or pay in lieu of notice to their temporary help workers whenever their work placements with the host client are terminated;
- Lastly, related companies will become jointly liable for each other's financial liabilities to their employees, even if there is no evidence of any "*intent or effect*" to defeat the purposes of the *Employment Standards Act.*

In order to enforce all these new statutory obligations, the Ontario Ministry of Labour will be hiring an additional 175 employment standards officers to monitor and police the extent to which employers are complying with their obligations. The Ministry intends to inspect 1 in every 10 workplaces throughout Ontario, over the next few years, to ensure that all employers are fully complying with their legal duties under the Act!

These new employment standards officers will be have increased powers to punish employers who contravene the Employment Standards Act:

(i) All employers will face increased administrative penalties when they fail to comply with their statutory obligations;

(ii) For the first time, the Director of Employment Standards will be empowered to publish and publicize the names of any and all employers who have failed to comply with their obligations under the Act;

(iii) Perhaps most seriously of all, employers *who inaccurately classify their employees as independent contractors, rather than as employees*, will be fined — even if the employees themselves claim to be independent contractors and connive with the employer to present themselves as such!

JUDICIAL UPDATE
The Most Important Court Decisions From The Last Six Months

Papp v. Stokes et al, 2017 ONSC 2357 (CanLII)

This past April, the Ontario Superior Court confirmed that employers cannot ordinarily be sued on the oral or written references that they provide for their former employees, unless it can be shown that they acted maliciously or with reckless disregard for the truth of what they wrote or said.

In this case, the plaintiff employee had asked the President of his former employer if he could use him as a reference in his applications for new employment. The President had acceded to this request, thereby probably tacitly implying to him that his reference would be relatively positive.

However, when later contacted by a prospective employer, the President – contrary to expectation – provided *a highly negative reference*, stating that the employee's work had been unsatisfactory, that he had not gotten along well with other employees, and that he would not be rehired if he reapplied for his former position. None of these criticisms had ever been shared with the employee during the course of his employment, and when he had asked the President to act as his reference, he therefore had had no inkling that they would be expressed to his prospective employer.

As a result of the President's negative reference, the prospective employer dropped the employee from consideration for future employment, and – furious with this unexpected result – the employee sued both his former employer, and its President, for defamation.

The Court found that there was no question that the President's negative comments had been defamatory, in that they would have tended to lower the employee's reputation in the eyes of any prospective employer. Nonetheless, the Court dismissed the employee's lawsuit on the grounds of both justification and qualified privilege.

The Court ruled that under Canadian law, when an employer makes negative and defamatory comments about a former employee, those defamatory comments are protected by qualified privilege. The employer therefore cannot be sued for those comments unless the employee can prove that the comments were made with malice or with reckless disregard for the truth. Moreover, if what an employer says in its reference is true, this also independently serves as a complete defence against a former employee's claim of defamation for a negative reference.

This decision highlights how remarkably safe it is for Canadian employers to provide references to former employees, *and how mistaken employers are to think that such references are dangerous to give.* Statistically speaking, the danger you run in giving an employment reference, is *less* than that of being run over by a bus when crossing a street to go to work. In the 100 years since the end of World War I, there has not been a *single* reported court decision, *anywhere in Canada*, of any employee successfully suing his or her former employer for a defamatory, or otherwise negative, job reference!

Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402 (CanLII)

This past May, the Ontario Court of Appeal released its long-anticipated decision in the sensational and nationally publicized lawsuit brought by the long-serving manager of an Ottawa McDonald's franchise who was terminated due to her understandable reluctance to accept a significant demotion.

In its decision, the Court of Appeal made several significant findings regarding the extent of an employee's legal obligation, following termination of his employment, to make reasonable efforts to get new employment so as to reduce the amount of money owed to him by his former employer.

In this particular case, the terminated employee had rejected a new job offer from her former employer. That job offer paid substantially the same salary as before, but involved reduced responsibilities, benefits and a lesser job title, and required her to report to someone who had previously been her subordinate.

In Court, the employer argued that by failing to accept that offer of a new, though lesser, job, the employee had breached her legal obligation to seek new employment, thereby disentitling her to claim damages. The Court of Appeal rejected this argument on the grounds that a terminated employee has no obligation to accept a new job

offer if doing so would, as in this case, be humiliating in the eyes of any reasonable observer.

During the first six months following her departure from McDonald's, the employee had made little effort to find comparable new employment for which she was qualified. Instead of applying for other available restaurant management positions, she had focused most of her efforts on starting a personal business. That business had been unsuccessful and had not produced any income for her, such as to reduce the money owed to her by her former employer.

In Court, her employer therefore argued that by choosing not to apply to any other restaurant management positions, and by submitting only a single job application elsewhere, the employee had breached her legal duty to make reasonable efforts to find new employment.

The Court of Appeal rejected this second argument, ruling instead that a terminated employee is relieved of her legal duty to seek new employment if she makes bona fide, though unsuccessful, efforts to start an income earning business for herself. The Court stated that "*a terminated employee is entitled to consider her own long-term interest, so she will not fail to mitigate because she chose to take some career risks that might not minimize the compensation that her former employer will owe to her*".

Prior to her termination, the employee had also worked after hours at a second part-time job for another employer, and had continued to do so on an expanded scale following her termination. In Court, the employer argued that following her termination, the income earned from such part-time jobs should be deducted from the pay in lieu of notice that was owed to her.

The Court rejected this argument, just like all the employer's other arguments, on the grounds that since the employee had already been working a second part-time job at the time of termination, her part-time employment was not a replacement for the job she had lost. Income from that part-time employment, therefore, could not fairly be deducted from the pay in lieu of notice that her former employer owed to her.

Bottiglia v Ottawa Catholic School Board, 2017 ONSC 2517 (CanLII)

In May, an important decision was released in another Ottawa-based lawsuit, this time by the Ontario Divisional Court, on the issue of when an employer is entitled to insist that its disabled employees submit to an independent medical examination ("IME") to evaluate the extent to which they are medically capable of fully returning to work.

In this particular case, the employer (the Ottawa Catholic School Board) had requested that the disabled employee (its longstanding Superintendent of Schools) attend an IME, because it had received conflicting reports from that employee's own doctors about the extent to which he was medically capable of returning to work. The disabled employee ultimately refused to attend the IME on the grounds that his employer had provided prejudicial information to the doctor, which he felt might bias that doctor and thereby compromise his ability to conduct an examination which was truly independent and objective.

The Divisional Court ruled that employers are legally entitled to insist on their employees submitting to IME's in two circumstances: (i) when such obligation is stipulated in the employment contract; or (ii) when the employer has reasonable grounds to question the adequacy and reliability of the medical information which it has received from the employee. The Court ruled that in this particular case, the School Board had been justified in insisting that its employee submit to an IME because the contradictory prognoses which the employee and his physician had produced constituted a reasonable and bona fide reason for questioning the adequacy and reliability of the medical prognoses.

However, the Court also raised several important caveats to this principle. It stated that before an employer insists that its employee attend an IME, it must ordinarily first try to obtain the information it wants from the employee's own doctor, and can only insist on an IME where it cannot

reasonably expect the employee's own doctor to reliably provide that information. The Court also stated that the employer is not entitled to insist on an IME simply for the purpose of second guessing or rebutting the prognosis of the employee's own doctor. Finally, the Court also stated that an employee is legally entitled to refuse to attend an IME where the employer provides the independent doctor with information "*which might reasonably be expected to impair [his] objectivity*".

> *The employer is not entitled to insist on an IME simply for the purpose of second guessing or rebutting the prognosis of the employee's own doctor.*

Ultimately, should a sick or disabled employee refuse to attend an IME (which the employer has validly requested on the basis of reasonable doubts regarding the reliability of the information provided to it), without any valid reason for doing so, then the employee will be in breach of his or her legal duty to cooperate with the employer's attempts to accommodate his or her illness or disability, If that occurs, the employer may thereby find itself relieved of its legal obligation to accommodate the employee, and ultimately may even be entitled to immediately terminate that employee's employment.

This decision illustrates just how carefully employers and employees must tread when deciding whether or not to have recourse to an IME. A prudent and prescient employer, who wishes to avoid having to deal with this difficult situation, may wish to insert into its employment agreements a clause requiring employees to submit to future IME's in certain specific circumstances. If the employee signs an agreement containing such a clause, the employer will subsequently be within its legal rights to force him to comply to keep his job.

Nagribianko v. Select Wine Merchants Ltd., 2017 ONCA 540 (CanLII)

In June, the Ontario Court of Appeal released a decision which effectively settles a long-simmering dispute between employment lawyers about when probationary employees are entitled to notice or pay in lieu of notice upon termination.

This case involved an employee whose employment was abruptly terminated, shortly before the end of his six-month probationary period, without either notice or pay in lieu of notice. The employee's employment contract provided for a probationary period, but did not explicitly state that he could be terminated without notice or pay in lieu of notice during his probation. Based on the contract's failure to explicitly specify this, the employee sued his employer for common law pay in lieu of notice.

Prior to this decision, Ontario courts customarily awarded generous common law pay in lieu of notice to probationary employees who were terminated while on probation *if their employment contracts did not contain a termination clause* explicitly providing that such termination could be effected without such notice or pay in lieu of notice. However, as a result of this decision from the Court of Appeal, this practice, and the law in this regard, has now been up-ended.

In its decision, the Court of Appeal rejected the employee's claim for common law pay in lieu of notice. The Court stated that probationary employees may always be terminated *without* common law notice or pay in lieu of notice, "*unless the employment contract specifies otherwise*", provided only that the employer's decision to terminate was made in good faith.

In reaching this decision, the Court took the revolutionary step of ruling that the mere fact of becoming a probationary employee *itself* implicitly rebuts that employee's ordinary legal entitlement to be provided common law notice or pay in lieu of notice when terminated. The Court added that in such situations, all the employer must pay to the terminated probationary employee is the statutory remuneration prescribed in the *Employment Standards Act*, which of course cannot be waived pursuant to section 5 of the *Act*. In this case, the employee had been employed for almost 6 months and was therefore statutorily entitled to be paid a single week of termination pay, pursuant to the *Act*.

EMPLOYERS BEWARE:

You Now Face Stiff New Penalties For Hiring Independent Contractors Who Are Really Employees

Recognizing when your workers are "*employees*" and when they are "*independent contractors*" is vital, particularly given the new fines that the Ontario Government plans to impose this Fall, on all employers who misclassify their employees as "*independent contractors*" or "*consultants*."

Doing so is also vital to avoiding significant future claims from the CRA and from your own staff. If your workers are in fact "*employees*'', you owe both them and Revenue Canada a number of financial and legal obligations, including the obligation to provide them with reasonable pay-in-lieu of notice, statutory termination pay and statutory severance pay upon termination of their work, the obligation to deduct and remit income tax from their pay and the obligation to pay into statutory compensation funds (Worker's Compensation, Employment Insurance, EHT, etc.) On the other hand, if your workers are "*independent contractors*" or "*consultants*" you owe none of the aforementioned obligations to either Revenue Canada or the workers themselves.

Many people wrongly believe that the distinction between employee and independent contractor turns on whether the worker calls him/herself an independent contractor and has an HST number. This widely held misconception causes many employers to mistakenly assume that their workers are independent contractors, rather than employees, simply because their workers signed contracts explicitly stating that they are independent contractors rather than employees.

This misconception can prove highly costly to employers who terminate a worker's employment in the honest, but erroneous, belief that he/she is an independent contractor who can be terminated pursuant to the terms of his/her contract, rather than an employee who is entitled to termination pay and severance pay under the *Employment Standards Act.*

The failure to pay into worker's compensation and employment insurance funds in the mistaken belief that the worker is an independent contractor exposes your company to the risk of being ordered to pay all of the accumulated unpaid arrears owing to these funds, when it is later proven that the worker is, and always was, an employee. In addition, the *Income Tax Act* makes you liable for all income tax owed to the federal and provincial governments by any of your workers who fail to pay such tax themselves, and who later turn out to have been employees rather than independent contractors.

Finally, commencing this Fall, your organization will now face the risk of stiff fines, pursuant to new Bill 148, for mistakenly classifying any of your workers as "*independent contractors*" rather than as "*employees*."

In reality, a contract or any other Agreement between yourself and your workers stating that they are working for you as "*independent contractors*" rather than "*employees*" is largely irrelevant to the determination of whether or not they truly are your employees in law. The same is true of the assignment to these workers of an HST number. The courts have said that the determination of whether a worker is an employee or an independent contractor turns on the substance of the working relationship, that is to say, on what he or she actually does in his or her work, rather than on the description given to that relationship.

The courts have also repeatedly ruled that, depending on the substance of the working relationship, a worker may be an employee and not an independent contractor even though both that worker and his/her employer hold the honest belief that that is not so! As in many areas of law, an honest but mistaken belief, on this issue, is no defence to the consequences of your mistake.

In law, the determination of whether a worker is an employee or an independent contractor turns on the following questions:

1. ***Who controls the manner in which the worker carries out his/her work?*** (i.e. who determines when he/she starts and leaves, where he/she does the work, and how he/she does that work?)

The more it is the *worker*, and not you, who exercises control, the more likely it is that a court will accept that the worker is an independent contractor rather than an employee;

2. ***Who owns the tools or equipment which the worker uses to carry out his or her work***? (Does the worker provide his/her own computer, vehicle, cell phone, etc., to *carry out his/her work during the working day?* Does he/she work out of his/her own office or out of an office that you, yourself, or one of your clients supplies?)

The more it is the *worker*, and not you, who provides these tools/equipment for carrying out work assignments, the more likely it is that a court will accept that he or she is an independent contractor rather than an employee.

3. ***In carrying out the work, does the worker run a risk of personal financial loss or stand a chance of profit?*** (Is he/she paid a fixed hourly or weekly salary, which is due to him/her regardless of the speed and efficiency with which he/she discharges his or her work assignments? Or is he/she paid on an assignment-by-assignment basis, or by piecework, such that the speedy execution of the assignment can result in his/her being able to take on new assignments and hence personally earn additional remuneration for his/her gain?)

The more the *worker* personally runs a risk of loss or a chance of profit in the discharge of work responsibilities, the more likely it is that a court will find him or her to be an independent contractor rather than an employee.

4. ***How well is the worker integrated into your company?*** (Does he/she work on-site or out of his/her own work premises? Is he/she working for your company on a permanent basis or simply working on a temporary, one-time assignment? Does he/she work exclusively for your company or does he/she work simultaneously for other companies?).

The less the worker is *exclusively, completely and permanently* integrated into your company's workforce, the more likely it is that a court will find him/her to be an independent contractor rather than an employee.

A court will look at all of the aforementioned variables when determining whether the substance of the relationship between you and your employees is that of an independent contractor or that of an employer/employee. There is no magic formula or arithmetical equation for making this determination. The court may very well determine that your workers are independent contractors, *even though only one of the four variables* listed above points to them being independent contractors, if the case is particularly strong on that one variable. Conversely, the court may very well determine that your workers are employees, *even though three of the four variables* point to them being independent contractors, if the Court determines that one variable to be an extremely important one.

Accordingly, when there is any doubt as to whether the relationship between you and your workers is one of employer/employee or independent contractor, a quick phone call to a lawyer who is well-versed in employment law would be highly advisable. Ultimately, that phone call could save you from having to later pay hundreds of thousands of dollars in (i) accumulated unpaid statutory remittances to Revenue Canada, (ii) fines to the Ministry of Labour and (iii) pay-in-lieu of notice to the workers themselves.

QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

(Can you score 5 out of 5?)

IS IT TRUE THAT……

1.	When an employer receives a complaint of sexual harassment from one of its employees, it must act immediately in terminating or at least disciplining the alleged perpetrator.	True / False
2.	Unexplained absenteeism, repeated lateness and outright insubordination, can often amount to just cause for terminating an employee.	True / False
3.	Generally speaking, termination packages can be structured in three (3) ways: (i) payment by way of a single lump sum; (ii) payment by way of salary continuation over a period of weeks or months; and (iii) some hybrid of the above.	True / False
4.	The lump sum payment method is always the most economical method to use when terminating long-serving employees who are still relatively young and re-employable.	True / False
5.	The salary continuation method is generally most suitable for short-serving employees (to whom little pay in lieu of notice is owing) and for sexagenarian employees who are not easily re-employable.	True / False

(Answers on back page of this Newsletter)

ANSWERS TO QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

1. **FALSE**: An employer, who acts too swiftly in the face of a harassment complaint, without providing the accused harasser with due process in investigating the complaint, can expose itself to significant and costly consequences. The alleged perpetrator is entitled to know the case against him and to have an opportunity to defend himself against the allegations before the employer takes definitive action affecting his job. If the employer either summarily dismisses the employee or places him on an unwarranted leave of absence without providing him with that due process, then the employer can be successfully sued.

2. **FALSE**: Even unexplained absenteeism, repeated lateness or outright insubordination will *rarely* amount to just cause for termination, unless accompanied by multiple prior warnings to the offending employee, explicitly putting him on notice that further occurrences would result in immediate dismissal and providing him with a reasonable opportunity to rectify his bad behaviour.

3. **TRUE**: Termination packages can be structured by paying the employee a single lump sum of money, or by continuing his/her salary over a period of weeks or months, or some mixture of these two methods, except that statutory termination pay owing under the *Employment Standards Act* must always be paid in a lump sum.

4. **FALSE**: The lump sum payment method is generally the most economical method to use when terminating short-serving employees (to whom little pay-in-lieu of notice is owing) and for sexagenarian employees who are not easily re-employable (and who are very unlikely to earn replacement income during their notice period).

5. **FALSE**: The salary continuation method of payment is the most economical method to use when terminating long-serving employees who are still relatively young and re-employable (and who are likely to earn replacement income during their notice period).

FOR MORE INFORMATION OR LEGAL ASSISTANCE,
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