SPRING 2016

Soloway Wright lawyers

VOLUME #3 – ISSUE #7

LABOUR & EMPLOYMENT LAW NEWSLETTER

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

IN THIS ISSUE

DID YOU KNOW THAT…?

- Contrary to popular belief, when you terminate the employment of a non-employee who is a *dependent contractor* you are ordinarily required to pay him or her Common Law pay in lieu of notice, often in an amount approximating that which is owed to a regular employee;
- Nonetheless, you can terminate the employment of both dependent and independent contractors without paying them any statutory termination pay or statutory severance pay under the *Employment Standards Act*;
- The law now requires you to provide extra days off to Muslim, Jewish and other non-Christian employees, to enable them to celebrate their own religious holidays;
- 'Six-month' termination clauses, and any other clauses which explicitly provide dismissed employees with a fixed lump sum payment of *less than* 34 weeks' salary, may now be invalid due to potential conflicts with the *Employment Standards Act*, and this is regardless of how short the employee's actual length of employment has been with your organization;
- If your organization's employment contracts contain a properly drafted termination clause which, in 2016, is *still* legally *valid* then (subject to a few statutory exceptions) each time you terminate someone's employment, you need only pay him or her 1 week of statutory termination pay per completed year of service, to a cumulative maximum of 8 weeks' pay;
- On the other hand, if your organization's termination clause is now *invalid* due to recent legal developments, or if you never had such a clause to begin with, then you will be legally required to pay full Common Law pay in lieu of notice to each dismissed employee, often amounting to 1 or more months of salary per year of service, to an effective general maximum of 24 months' pay.

ABOUT US

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

CELEBRATING 70 YEARS

Soloway Wright lawyers

427 Laurier Avenue West, Suite 700
Ottawa, ON K1R 7Y2
(613) 236-0111 Telephone / (613) 238-8507 Fax
www.solowaywright.com

JUDICIAL UPDATE:
The Most Important Court Decisions From The First Quarter of 2016

***Keenan v Canac Kitchens*, 2016 ONCA 79**

In January, the Ontario Court of Appeal released an important decision clarifying the law on when employers must pay Common Law pay in lieu of notice to workers who are contractors rather than employees, and when such workers are deemed to enjoy "*dependent contractor"* status*,* rather than independent contractor status.

Non-employees are either independent contractors or *dependent* contractors. It is crucial for employers and their HR staff to understand the distinction between the two, because at Common Law, dependent contractors are now entitled to considerable reasonable notice of termination, or very significant pay in lieu thereof, whereas independent contractors are *not*. As demonstrated by this court decision, terminating a dependent contractor can now be just as expensive for employers as terminating their regular employees.

In this particular case, the plaintiffs were non-employee contractors who had worked for almost 20 years exclusively for the defendant employer, Canac, and who had subsequently worked for 3 years for *both* Canac *and one of its competitors*. During those final 3 years of simultaneously working for both companies, the plaintiffs had devoted approximately 66 - 80% of their working hours to working for Canac.

At the end of those 3 years, the plaintiffs were dismissed by Canac without reasonable notice, or pay in lieu of notice, on the basis that, in Canac's view, they were independent contractors and therefore not legally entitled to any notice. In support of its position, Canac claimed that they could not be *dependent* contractors because they had spent the last 3 years working part-time for another company, rather than exclusively for Canac, and therefore could not be said to be truly *dependent* on Canac for their income.

The Court of Appeal rejected Canac's argument, ruled that they were dependent contractors, and ordered Canac to pay them, as non-employees, an eye-popping 26 months of pay in lieu of notice. The Court reasoned that while they may no longer have been working *exclusively* for Canac and were therefore no longer dependent solely on Canac for their income, they nonetheless had to be characterized as dependent contractors because on the date of dismissal, the bulk of their income was still being paid by Canac. The Court also ruled that when determining whether someone is a dependent or independent contractor, lower courts and employers must look at the *entire history* of the contractor's work relationship with the employer, rather than focus solely on a "snapshot" of that relationship as it may have existed on the date of dismissal. Looking at the full history of Canac's relationship with the plaintiff contractors, it was clear that for most of that relationship they had been very substantially dependent on Canac for their income. They were therefore entitled, on dismissal, to very substantial pay in lieu of notice.

***Fleming v Massey*, 2016 ONCA 70**

In January, the Ontario Court of Appeal also released a decision which will now make it easier for certain Ontario employees to sue their employers for work-related injuries, and which will therefore significantly impact the level of workplace protection which Ontario employers are required to provide to their employees under the *Workplace Safety and Insurance Act*.

In this case, the plaintiff, Fleming, was employed to work at a go-kart track, and as a condition of his employment there, had signed a waiver agreement releasing his employer from liability for any injuries which he might suffer while on the job. Subsequently, he suffered serious injuries at work and, being an uninsured worker under Part X of the *Act*, proceeded to sue his employer for those injuries. The employer brought a Motion for Summary Judgement to dismiss his lawsuit on the basis that it was clearly barred by the terms of the employer's signed waiver agreement.

The Court of Appeal rejected the employer's argument and ruled that the employee was entitled to sue his employer, notwithstanding his signed waiver agreement. It declared that in Ontario, a waiver agreement, in which an employee waives injury-related claims, is legally unenforceable. In so doing, the Court enunciated that for public policy reasons, Ontario workers cannot validly contract out of the provisions of Part X of the *Act*, and cannot thereby waive their statutory right to sue their employer and receive compensation for the injuries which they may sustain in the course of their employment.

(Cont'd on Page 6)

EMPLOYERS BEWARE:
How Do You Deal With Aging Employees Who Don't Want To Retire?

Prior to 2007, it was commonplace for many employers to adopt mandatory retirement policies forcing employees to retire at the age of 65. These retirement policies could not be successfully challenged under the *Human Rights Code* because until then, the *Code* permitted employers to freely discriminate against employees on the basis of "*age*" as soon as they reached age 65.

All that dramatically changed as of December 2006 when the Ontario government amended the *Human Rights Code* to prohibit employers from forcing employees to retire *after* they had reached the age of 65. As a result of those 2006 amendments to the Code, it is now illegal to pressure an employee to retire at age 65 *or at any age at all.* It is also *prima facie* illegal for Ontario employers to terminate the employment of an employee when the decision to terminate is made, at least partly, as a result of concerns about that employee's age, *or about performance problems arising from his or her age*.

Across Ontario, employers are now faced with a difficult predicament, namely *what to do with their aging employees who refuse to voluntarily retire and who insist on soldiering on indefinitely in their jobs, in spite of flagging abilities?* The gravity of this predicament is accentuated by the fact that many sexagenarian employees are now choosing to indefinitely postpone their retirement plans, either from financial necessity, or because they are emotionally attached to the stability and familiarity of continuing to go into work each week. The latest statistics show that for a variety of reasons, record rates of Canadians are now electing to remain in the workforce, well into their seventies and even eighties, regardless of their deteriorating physical and mental capacities.

This demographic phenomenon, combined with the 2006 amendments to the *Code,* has created an unprecedented and growing HR problem throughout Ontario, which did not exist ten years ago, and which many experts predict will only get more serious over the next few years.

In determining how to deal with this growing predicament, HR staff need to tread very carefully, since any missteps in this area of the law can lead to extremely costly consequences for the employer. Moreover, the process of terminating the employment of an aging employee who does not want to retire can be so complicated that it has sometimes been described as the legal equivalent of navigating through a minefield!

Are there any situations where you can still lawfully *force* an aging employee to retire?

Despite the recent amendments to the *Code* eliminating the right of Ontario employers to force their employees into retirement once they reach the age of 65, there still remain two, very limited, situations where mandatory retirement continues to be legally permissible.

The first of these situations is where an employer can prove that age is a *bona fide occupational requirement* for the job, in that the occupation itself, by its very nature, requires exceptional physical and/or mental powers or reflexes, at a level which far surpasses the abilities of most older people and where trying to accommodate those older employees is impossible, as it would put the public safety at risk.

Under existing legislation, mandatory retirement policies have been upheld on this basis in cases involving firefighters, police officers, school bus drivers and other employees whose occupations are physically demanding and are essential to maintaining public safety.

The second very limited situation where an employee can still be lawfully forced to retire or be terminated is where the deterioration in his or her physical or mental abilities is irreversible, and is so serious that he or she is no longer able to carry out the core functions of his or her job, even with reasonable accommodation by the employer. In that situation, the law permits the employee to be forcibly retired or terminated because it recognizes that continued employment would create "*undue hardship*" for his or her employer.

As the Supreme Court of Canada stated in *Hydro-Québec v Syndicat section locale 2000,* when the characteristics of the employee's condition are such that the proper operation of the business, despite all accommodations, continues to be *excessively*

hampered, the employer may terminate his employment. The employer's duty to accommodate the employee's deteriorating performance ceases when the employee is no longer able to fulfill most of the basic obligations associated with his job.

In practice, this probably means that no employer can terminate the employment of an aging employee, on account of his declining abilities or productivity, *unless the decline reaches the point that the employee is completely unable to carry out the core functions of his job,* either physically or as a result of the onset of senility. Until that extreme situation arises, terminating the employee for age-related performance problems would likely constitute an illegal breach of the *Code.*

What other options do you have for purging your workforce of aging and highly problematic employees?

Accordingly, in the vast majority of situations, forcing an employee to retire is now illegal under the *Human Rights Code,* and can result in an Order from the Human Rights Tribunal ordering that you reinstate the employee to his or her position, with full backpay.

Faced with this new and unpleasant reality, employers have two remaining options for dealing with elderly employees whose continued employment is problematic. They may either: (i) induce the employee to retire *voluntarily,* by means of financial incentives *or* (ii) provide the employee with reasonable working notice of termination. Both of these options are fraught with risk and can easily backfire on the employer. Accordingly, the successful implementation of both options requires considerable planning, finesse and caution.

(i) *Inducing older employees to retire voluntarily*:

Although *mandatory* retirement policies may now be illegal, *voluntary* retirement programs and packages are not. In the wake of the 2006 amendments to the *Code*, it is still lawful for employers to induce employees to retire *voluntarily* when they reach a certain specified age, so long as such retirement programs are not mandatory and so long as financial incentives, rather than coercion, are used to persuade the employee to retire of their own free will.

In implementing these voluntary retirement programs, employers must be careful not to exert undue pressure on the employee to accept the retirement incentive or package. Providing the employee with information about age-related retirement incentives is not discriminatory. However, *pressuring* the employee to accept those incentives or package is tantamount, in law, to forcing him or her to retire, and therefore constitutes just as much a breach of the *Code* as any mandatory retirement policy.

In order to stay on the right side of the law, Ontario employers must exercise caution when choosing what to say to employees when presenting them with a voluntary, age-related retirement package. In discussing the package with the employee, they must take care to avoid any implicit suggestion of coercion, which might subsequently cause the employee's acceptance of the package to appear to a court or tribunal, as having been anything less than completely "*voluntary*". This is because the Human Rights Tribunal often takes an extreme, and extraordinarily broad, view of what constitutes coercion by an employer. In *Deane v Ontario,* the Tribunal ruled that the employer had violated the *Code* when its manager, in discussing the retirement package with the employee, commented that "*she would be 'foolish'* not to retire and to accept such a generous early retirement offer.

When presenting an aging employee with a voluntary retirement package, a prudent employer, who wishes to minimize the risk of triggering a Human Rights Complaint, should take some, or all, of the following precautions:

- It should ensure that discussions about the retirement package are initiated by someone other than the employee's immediate supervisor;
- It should make it clear to the employee that he or she is completely free to accept or reject the proposed retirement package, and that rejection of the package will not put his or her continued employment at risk;
- Ideally, it should make the retirement package available to all staff, rather than limit it solely to the aging employee whom the employer would like to see immediately retire; and
- Above all, it should ensure that the retirement package includes a release agreement, releasing the employer from all potential Human Rights claims, which the employee must sign as a condition to obtaining the retirement funds.

As an added precaution, some organizations have successfully reduced the risk of litigation arising from

voluntary retirement packages by implementing a form of "retiree on-call" program, whereby the retiree continues to perform services for the employer on a part-time or 'as-needed' basis. Such programs help retirees to adjust to the difficult transition from full time work to full retirement. They can also be useful to employers by providing them with continued access to the retirees' accumulated expertise and experience.

(ii) *Giving reasonable working notice of termination*

Another method of lawfully eliminating problematic employees, other than by inducing them to accept a voluntary retirement package, is to terminate their employment on grounds which are genuinely unrelated to their age. This can be a difficult and delicate exercise for an employer to undertake because if the termination is to be legal, it must be for reasons which not only have absolutely nothing to do with age, but which also have nothing to do with *age-related* performance problems or with declining productivity *arising from age*. Under the Ontario *Human Rights Code* it is *prima facie* just as illegal to terminate someone's employment *for work performance problems which are age-related* as it is to explicitly terminate them on account of their age.

In order to reduce the risk of being subjected to an age-related Human Rights Complaint, and being dragged into legal proceedings at the Human Rights Tribunal, employers may wish to take the following precautions:

- *Provide generous working notice of termination:* An employee who is given substantial working notice of his final day of employment, equal to or greater than what the law requires, is less likely to conclude that his termination is for age-related reasons, and to file a Human Rights Complaint;
- *Offer the employee continued post-termination employment, on a fixed term basis:* If the employee is promised continued full-time or even part-time employment, on a fixed term contract, immediately following the termination of his indeterminate employment, he is also much less likely to file a Human Rights Complaint; and
- *Try to persuade the employee to formally consent to the terms of the termination:* If the employee can be persuaded that the terms of termination are fair, or even generous, he or she may be willing to sign a Release releasing the employer from potential Human Rights claims

How do you reduce the high costs and risks associated with terminating older employees?

Terminating the employment of aging employees can be very expensive, and risky.

The worst case scenario for any employer occurs when a terminated employee is able to prove that his or her termination was the result of illegal age discrimination. If the employee can establish this, the court or tribunal has the power to order the employer to reinstate the employee to his job and to pay him back pay for his lost wages between the date of his illegal termination and the date of his reinstatement. In practice, this often results in the employer having to pay the illegally dismissed employee several years' worth of salary as well as any damages that might be awarded for injury to the employee's dignity, feelings and self-respect.

Even if the employee is not able to establish that his termination was likely the result of illegal age discrimination, the employer may still find itself subject to a very costly claim for pay in lieu of notice. Unless your organization has a valid and enforceable termination clause in the terminated employee's employment contract, a court will inevitably order you to pay the employee reasonable pay in lieu of notice of termination; in the case of long-serving sexagenarian employees such an order will often result in your organization being ordered to pay the employee hundreds of thousands of dollars. This is because when assessing how much pay in lieu of notice is owed to a terminated employee, the courts are required to consider the factors set out in *Bardal v Globe & Mail Ltd.,* including the employee's age, length of service, and future employment prospects. In the case of any sexagenarian employee, who has limited prospects for reemployment, and who has been employed with your organization for many years, any application of these factors effectively requires the courts to award notice periods of up to 24 months' salary and benefits.

The fact that an employee is in his sixties and is therefore approaching the end of his working career does not reduce the pay in lieu of notice which your organization will be required to pay. Last year, in *Arnone v Best Theratronics Ltd.,* the Court of Appeal forbade lower courts, when assessing notice, from using a "*bridging approach*" to limit employee notice to the employee's likely age of retirement.

For these reasons, a prudent employer who wishes to avoid having to pay out 24 months of salary and benefits coverage when it ultimately terminates its older and longer serving employees, should try to ensure that all its employees, young and old, sign written employment contracts containing valid termination clauses limiting how much notice must be provided to them on termination. Without such a termination clause, terminating the employment of older and long-serving employees, even for non-discriminatory reasons, will be very costly.

When dealing with aging employees, each organization must develop an approach which is customized to its own particular needs and circumstances. In some cases, terminating such employees may be the less risky and expensive than offering them a creative retirement package, and in other cases, the opposite holds true. Neither of these two options will be entirely free of significant risk and cost for any organization, and the success of each will depend very much on the care and foresight with which it is implemented. For that reason, before your organization decides on what approach to use in its dealings with an aging employee who is reluctant to retire, it would do well to consult with a lawyer who has extensive experience and expertise in dealing with such matters.

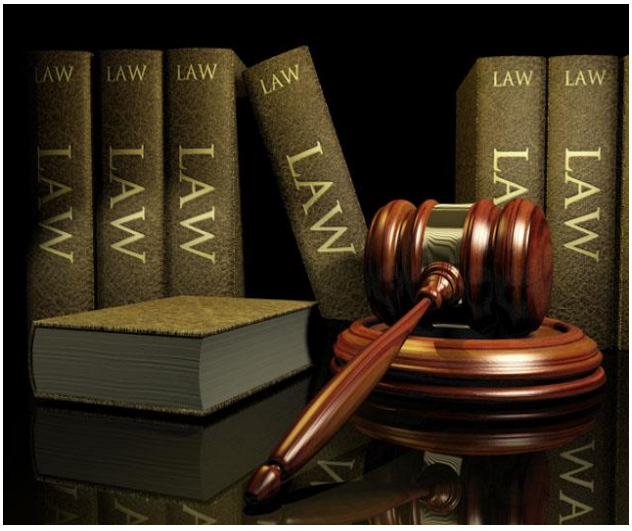
JUDICIAL UPDATE: (cont'd from Page 2)
The Most Important Court Decisions From The First Quarter of 2016

Bellehumeur v Windsor Factory Supply Ltd., **2016 CanLII 9763 (SCC)**

This past February, the Supreme Court of Canada issued a significant human rights ruling denying leave to appeal from an earlier decision of the Ontario Court of Appeal. That decision arguably now makes it easier for Ontario employers to dismiss disabled employees. The importance of the decision, for employers and their HR staff, is that it confirms that the termination of a disabled employee for performance-related problems, which arise partly from an undisclosed disability, will be legal if the employer can show that it had absolutely no prior knowledge of the disability and no reasonable means of detecting that disability.

In this particular case, the plaintiff, Bellehumeur, was an employee who suffered from a medically verified mental disability, and who had been dismissed for cause because he had made violent threats to some of his fellow-employees. Bellehumeur's position was that the threats arose in part from his mental disability and that the employer had therefore decided to terminate his employment for reasons which were linked to that disability, without any prior attempts to accommodate him, in breach of the Ontario *Human Rights Code*.

Despite Bellehumeur's evidence that he had been disabled at the time of his dismissal, the Court of Appeal rejected his lawsuit and confirmed the legality of his dismissal. It did so on the grounds that at the time of the dismissal the employer had had absolutely no knowledge of the disability. Since the employer was completely unaware of Bellehumeur's mental disability, and most crucially, because *there was no indication that he might be suffering from any disability*, the employer's actions in dismissing him did not constitute illegal discrimination or any failure to accommodate him under the *Code*.



The Court of Appeal concluded that even where a disabled employee's misconduct is aggravated by his disability, such is irrelevant if the disability plays no actual part in the employer's decision to terminate his employment and the employee suffers no greater prejudice than any other employee who engages in the same misconduct.

Howard v Benson Group Inc., 2016 ONCA 256

In April 2016, the Ontario Court of Appeal released a decision which has great potential consequences for how much notice of termination, or pay in lieu of notice, Ontario employers will now have to pay to employees who are on fixed term employment contracts.

In this case, the plaintiff, Howard, was a managerial employee who had been hired for a 5-year term, pursuant to a fixed term contract, which contained an early termination clause enabling the employer to terminate Howard's employment at any time during

the 5-year contract. After less than 2 years of work, the employer terminated his employment. Howard sued for the 3 years' of wages which remained to be paid under his 5-year contract, claiming that as a fixed term employee he was legally entitled to be paid out the full balance which was still owing to him under the contract. His employer argued that he was only entitled to the notice prescribed in the early termination clause or, in the alternative, to a couple of months of Common Law notice, because he had worked for the company for less than 2 years. The employer also argued that it could not possibly be liable to pay Howard the full 3 years of salary remaining under his fixed term contract because he had not tried to find alternate employment during this time.

The Ontario Superior Court initially ruled that the ambiguous wording of the termination clause in the employment contract made it void and that Howard was therefore entitled to Common Law pay in lieu of notice. Howard appealed this decision to the Court of Appeal.

The Court of Appeal overturned the decision of the Superior Court and awarded this 2-year employee the *full* amount owing for the more than 3 years which still remained on his contract, in the colossal amount of almost $200,000.00. It ruled that in Ontario, whenever there is a fixed term contract without a legally valid termination clause, the fixed term employee is entitled, on termination, to the totality of the wages which he would otherwise have received for the balance of the term of the contract.

Even more importantly, the Court of Appeal also confirmed that in the case of fixed term employees, as opposed to employees who are employed for an indeterminate or indefinite term, an Ontario employer cannot ordinarily deduct any of the mitigation income which the employee earns elsewhere following the termination, *unless the fixed term contract contains wording explicitly entitling the employer to make that deduction*. According to the Court, Ontario employers are ordinarily required to pay fixed term employees the wages owing for the balance of the contract, even if they find another comparably paying job in the days or weeks following their termination and are therefore effectively double-dipping during the notice period.

This decision illustrates the risks which employers assume when choosing to hire employees for fixed, rather than indefinite, terms of employment. Many HR staff assume that by hiring employees to fixed short term contracts, rather than to contracts of indefinite duration, they are reducing the company's risk and potential liability upon eventual termination of those employees. In fact, as this decision proves, the exact opposite may be true, in that by signing an employee to a fixed term contract, the employer now potentially exposes itself to astronomically greater liability, unless the fixed term contract is carefully and expertly drafted so as to avoid the problems identified by the Court of Appeal in this and other decisions.

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

(Can you score 5 out of 5?)

IS IT TRUE THAT……?

1. As an employer, you may always place an employee on a leave of absence so long as you continue to pay his salary and benefits coverage during that period of leave. True / False

2. When terminating an employee's employment, the employer always has discretion on whether to pay him/her the pay in lieu of notice by either lump sum payment or salary continuation over a period of weeks or months. True / False

3. Off-duty employees are free to say or write whatever they want, and to whomever they please, so long as they refrain from doing so while at work. True / False

4. An alleged harassor who is disciplined or dismissed before an investigation is properly carried out may sue his employer for damages. True / False

5. An employer can be found to have unwittingly breached the Ontario *Human Rights Code* if it dismisses an employee for performance-related problems which later prove to have been partly caused by some medical condition which it unreasonably overlooked at the time of the termination. True / False

(Answers on the back page of this Newsletter)

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

1. **False**: The Supreme Court of Canada has recently ruled that employers cannot lawfully deny their employees the reputational benefit of working by placing them on a paid leave of absence, except where there are legitimate business reasons which necessitate forcing the employee to be temporarily absent from the workplace and where those reasons are truthfully disclosed to the employee when he is ordered to take the temporary leave.

2. **False**: While an employer usually has the discretion on whether to pay the dismissed employee by way of lump sum payment or salary continuation, this is not always so. Whatever statutory termination pay and statutory severance pay may be owing to the dismissed employee, pursuant to the *Employment Standards Act*, must be paid to him by way of lump sum payment within 7 days of the date of termination or by the next regular pay day. In addition, some employment contracts stipulate that on termination, all pay in lieu of notice must be paid out in a lump sum.

3. **False**: Whenever the misbehavior of an off-duty employee prejudicially affects an employer's public "brand" in a serious way, he or she may be dismissed for just cause even though the misbehavior occurred offsite and off duty, and even though it had absolutely nothing to do with his or her work.

4. **True**: The alleged perpetrator in a harassment complaint is entitled to know the case against him and to have an opportunity to defend himself against the allegations which have been made against him before his 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 due process, then the employer can be successfully sued for damages.

5. **True**: The dismissal of any employee for performance-related problems which later prove to have been partly caused by some overlooked medical condition which the employer ought reasonably to have noticed or inquired into, usually amounts to illegal discrimination pursuant to the Ontario *Human Rights Code*. In the face of such a breach of the *Code*, a court or tribunal is empowered to set aside the termination and order the employer to reinstate the employee and pay him backpay as well as any other damages he may have suffered.

CELEBRATING 70 YEARS
Soloway Wright | lawyers

FOR MORE INFORMATION OR LEGAL ASSISTANCE,
PLEASE CONTACT ANY ONE OF THE FOLLOWING MEMBERS OF THE

SOLOWAY WRIGHT LLP EMPLOYMENT LAW GROUP

Alan Riddell (Partner)	**613-782-3243**	riddella@solowaywright.com
Kyle Van Schie (Associate)	**613-782-3211**	kvanschie@solowaywright.com
Catherine Davis (Employment Law Clerk and Legal Assistant)	**613-782-3235**	davisc@solowaywright.com