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Soloway Wright lawyers

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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

ABOUT US

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

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DID YOU KNOW THAT…?

- Contrary to popular belief, you can only place an employee on unpaid temporary lay-off if he/she has expressly *agreed* to be laid off without pay or if such unpaid layoffs commonly and/or customarily occur on a regular basis within your organization and industry;

- Also contrary to popular belief, terminating a fixed-term employee can often be far more costly and difficult than terminating an employee who is employed for an indefinite term of employment because the notice owed to a dismissed fixed-term employee is ordinarily *the full remainder of his or her fixed-term contract*, rather than simply reasonable Common Law pay in lieu of notice;

- You can be fined up to $500,000 for failing to create a written Workplace Harassment Prevention Policy or a Workplace Violence Prevention Policy, as the *OHSA* now makes both policies mandatory;

- In some circumstances, inserting a non-competition or non-solicitation clause into an employment agreement can dramatically increase the pay in lieu of notice which you will ultimately have to pay your employees if and when you terminate their employment;

- An employer can be punished for improperly alleging just cause for termination, by being ordered to pay the employee significantly increased damages;

- If one of your employees fails to take at least two (2) weeks of annual vacation, the *ESA* requires that you pay him/her out for those vacation days by the end of the year, even if your organization's written policy stipulates that those vacation days will be lost if not taken during the calendar year;

- Whenever employees return from pregnancy or parental leave, you must reinstate them into *the very same job* that they had before, if such still exists, rather than move them into a *new but comparable job*.

QUEEN'S PARK UPDATE:

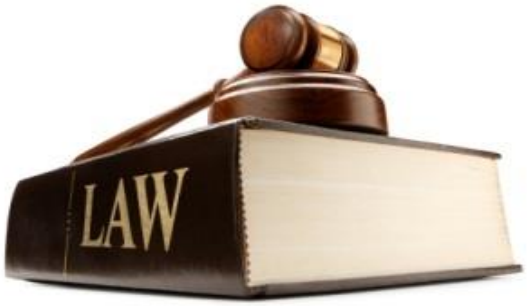
The Most Important New Statutory And Regulatory Changes So Far This Year

1. *Bill 132: Sexual Violence and Harassment Action Plan Act*

In March 2016, Bill 132 became law; its provisions come into force on September 8, 2016 and must be fully complied with by that date. Bill 132 provides:

- A new definition of "workplace harassment" which incorporates "*workplace sexual harassment*";
- A requirement to review and amend harassment policies to include workplace sexual harassment;
- A new obligation for employers to develop, maintain and review their written workplace harassment policy each year so as to address:
  - The reporting of workplace sexual harassment;
  - How future incidents and complaints will be investigated and dealt with;
  - How investigative information will be kept confidential; and
  - Training under the policies;
- A duty for employers to investigate all incidents of workplace harassment and inform both the victim and harassor of the results of that investigation, along with any corrective steps that are taken; and
- That the Ministry can appoint an impartial third party to conduct an investigation at the employer's expense.

Employers who breach these provisions are subject to significant penalties and fines of up to $500,000.



2. *Bill 12: Amendment to the Employment Standards Act (regarding tips and gratuities)*

On June 10, 2016, the Ontario Legislature enacted changes to the *Employment Standards Act,* prohibiting employers from withholding, making deductions from or collecting tips or other gratuities from employees except as specifically authorized under the *Act*. In particular:

- Employers are now allowed to withhold tips and gratuities only if they redistribute that money to their employees; and
- Any tips that an employer withholds, in violation of these provisions, will be deemed to be a "*debt*" owing to the employee, which the Ministry of Labour will then forcibly collect from the employer as unpaid wages.

3. *Occupational Health and Safety Act, Regulation 381/15 (Noise Regulation)*

On July 1, 2016, Regulation 381/15 of the *Occupational Health and Safety Act* came into force, regulating workplace noise levels. It requires employers to take "*all measures reasonably necessary in the circumstances to protect workers from exposure to hazardous sound levels.*" The new regulation requires employers:

- To ensure that workers are not exposed to sound levels greater than 85 decibels over an 8 hour work shift unless they use hearing protection devices;
- To implement engineering controls, work practices and hearing protection devices whenever necessary;
- To post clearly visible warning signs near areas where sound levels regularly exceed 85 decibels;
- To provide adequate training and instruction to workers who use hearing protection devices.

4. *Minimum Wage rates*

This past Spring, it was announced that effective October 1, 2016, Ontario's minimum wage would be increased to the following levels:

- General minimum wage = $11.40 per hour
- Student minimum wage = $10.70 per hour
- Liquor Server minimum wage = $9.90 per hour
- Homeworker minimum wage = $12.55 per hour

5. *Amendments to the AODA*

Effective July 1, 2016, the following amendments to the *Accessibility for Ontarians with Disabilities Act* ("*AODA*") came into force:

- The definition of an exempted "*small organization*" was broadened to include organizations with between 1 and 50 employees;
- Private sector employers with fewer than 50 employees are no longer required to document their customer service policy or make it publicly available; nor must they maintain training records;
- Going forward <u>all</u> employees, volunteers and other persons who provide goods, services or facilities to customers must undergo ongoing *AODA* training. Such training must be repeated whenever there are changes to the company's service policy;
- Employers with 50 or more employees must now keep records of the training that they provide and must maintain a written record describing the training policy and the contents of the training;
- Organizations with 50 or more employees must now prepare a document describing the feedback process, which is to be disclosed to any person who requests a copy; and
- A notice that this document is available must be posted on the premises and/or website.

EMPLOYEE REFERENCE LETTERS:

IS IT SAFER TO PROVIDE THEM THAN TO REFUSE THEM?

Does your organization have a general policy of refusing to provide former employees with reference letters, or of always baldly limiting such letters to a bare-bones summary of the duties of their position and the dates of their employment? If so, then it is high-time that you rethink your organization's policy in light of the following three legal realities:

1ST LEGAL REALITY: Your chances of being successfully sued on a properly written reference letter are virtually non-existent:

Many employers mistakenly assume that they can easily be sued for what they say to a prospective employer about a former employee. That is false. Contrary to common belief, the statistical risk of being sued for something you might have said about a former employee in a reference letter, or over the phone, to a prospective employer are slim to none. In the 100 years since the First World War, *there hasn't been a single reported case anywhere in Canada* of either a former employee or his new employer ever successfully suing a former employer on an employee reference letter! During those 100 years, employers across Canada have written literally millions of employee reference letters, many of them expressing statements or opinions which were highly questionable, if not downright inaccurate, with complete legal impunity.

Why is this? Simply because under Canadian law, it is extraordinarily difficult to successfully sue an employer for what he or she has said about an employee in a reference letter, or over the telephone. Employers are protected from lawsuits from former employees who are upset with the reference by what is known in law as '*qualified privilege'.* This means that any former employees who want to sue you must do a lot more than simply prove that what you said was factually inaccurate. They must go the extra mile of proving that you wrote or spoke *maliciously* or with *reckless disregard for the truth.* In addition, they must prove that your malicious or recklessly inaccurate statement actually *caused* them some damage by preventing them from being hired for a job that they would otherwise have secured. In *Spring v Guardian Assurance PLC*, one of the rare foreign cases where an employer has ever been found liable for what it wrote in an employee reference letter, the British House of Lords awarded damages against the employer for negligently repeating factually unsupported allegations which it had never bothered to properly investigate. In foolishly repeating these unfounded and uninvestigated rumors in its reference letter, the employer acted recklessly and without proper regard for the truth.

Canadian law makes it similarly difficult for *other employers* to sue you for what you said, or failed to say, in an employee reference letter or telephone conversation. If the new employer of your former employee wants to sue you, it too must do more than simply show that what you said was factually inaccurate. It must go the extra step of proving (1) that in saying, or failing to say, something about the employee, you acted carelessly or with a negligent disregard for the truth; that *(2) but for your misrepresentation, it would never have hired the employee* and that *(3) this hiring actually caused the new employer some damage.* In practice, proving all three of these things is very difficult, except in fairly extreme circumstances, such as where you write a reference letter implying that the employee is honest, despite having strong evidence that he/she has engaged in dishonest or quasi-criminal behavior.

By way of illustration, in *Joint Unified School District,* a California employer - a school board - issued a reference letter for one of its former teachers, without disclosing that it had received multiple complaints of sexual assault and harassment of students. In reliance upon that reference letter, another school board hired him, whereupon he sexually assaulted one of its students. The Supreme Court of California awarded damages against the school board which had issued the reference letter. It determined that the school board's glaring omission to disclose that it had received multiple prior complaints of sexual assault about its former employee, prior to drafting its reference letter, "*amounted to an affirmative misrepresentation presenting a foreseeable and substantial risk of harm*" to future employers and their students.

No such reported cases have ever occurred in Canada, and the upshot is that Canadian employers cannot be successfully sued for anything inaccurate which they say about an employee in a reference letter, or a phone conversation with other employers, unless it can be proven *that they either knew at the time that what they were saying was misleading and/or recklessly turned a blind eye to the truth, thereby causing someone some*

real damage. More particularly, as an employer, you cannot be sued for what you say about an employee to another employer when you simply express your own reasonably based and honestly-held opinions about that employee, based on a comprehensive overview of his or her work record within your organization, *even if your opinions later prove to be mistaken and factually inaccurate*.

2ND LEGAL REALITY: Your refusal to provide a proper reference letter may significantly increase your financial liability:

While there is little statistical likelihood of ever being penalized for *agreeing to provide* a reference letter, the same cannot be said for *refusing* to provide one. If your organization refuses a former employee's request for a reference letter, it runs the risk of being punished by increased damages or costs awards. Since the Supreme Court of Canada's decision in *Wallace v. United Grain Growers,* courts have repeatedly imposed such added financial sanctions on employers who reject such requests from dismissed employees. For example, in *Deplanche v Leggat Pontiac Buick Cadillac Ltd*., the court ordered the employer to pay an additional 6 months of pay in lieu of notice due, in part, to its failure to provide a letter of reference to the dismissed employee.

More importantly, by refusing to provide a terminated employee with a reference, you make it more difficult for him or her to secure comparable employment, thereby thwarting his or her ability to mitigate his or her damages, and increasing the pay in lieu of notice which you may eventually have to pay. The more rapidly you provide the reference, and the more positive you can truthfully make that letter, the quicker the terminated employee may be able to secure new paid employment, thereby reducing your organization's ongoing liability to that employee during the notice period.

3RD LEGAL REALITY: Your agreement to provide a properly written reference letter decreases your risk of being sued:

Statistics show that employees who are offered reference letters are far less likely to sue their employer for additional pay in lieu of notice, unpaid overtime or potential human rights breaches. This is because an employer's offer to provide a reference letter to an employee creates a powerful disincentive for that employee to sue that employer, especially where the offer allows for mutual collaboration on the drafting of that letter.

Employees, like most people, usually respond positively to offers of assistance. The more positive the reference letter, the more goodwill it creates with the departing employee, thereby reducing the risk that he or she will later sue your organization and increasing the likelihood that he or she will actually say good things about you to others in the community.

Given these three legal realities, it is usually in your organization's best interests to try to provide a departing, or even dismissed, employee with as positive and detailed a reference letter as is truthfully possible, rather than simply issuing a bald 'confirmation of employment' letter.

The following are 5 key steps that any prudent employer should follow when drafting a proper and detailed reference letter for a departing or dismissed employee:

Step 1: Make A List Of The Employee's Good Traits/Strengths – All employees have strengths and weaknesses. Even the worst employees have at least a couple of strengths or good qualities, which will become apparent if you think hard enough about them. Make a list of several good traits/strengths. It may help to jog your thinking if you use one of your firm's blank performance evaluation forms.

Step 2: Select The 3 or 4 Most Important Traits/Strengths - Pick the ones which are going to sound the most impressive, or which you think are the ones on which the employee most excels.

Step 3: Draft 1 Short Paragraph On Each Of Those Traits/Strengths - Each paragraph should start with a short sentence on the trait, followed by another sentence in which you provide an example or illustration of how the trait manifested itself, or was applied to the employee's work, or helped the firm.

Step 4: Add An Introductory Paragraph To The Start Of The Letter - The first paragraph of your letter should state how long the employee worked for your firm, in what capacity and what he or she did. It should also include a sentence that explains what your professional relationship was with him or her, and why it is that you are well placed to comment on his or her abilities and experience.

Step 5: Send The Employee His/Her Copy Of The Letter, But In The Case Of A Dismissed Employee, Do So Only After He Or She Has Signed A Release That Releases You From Future Claims - If you provide the letter to the employee while his or her wrongful dismissal suit or human rights complaint is still pending, then it may be used against you in that suit or complaint. Obviously, this cannot occur if you provide the letter after a Release has been signed.

If you have any doubt on whether certain aspects of your draft reference letter might be construed as deliberately misleading or reckless with the truth, and might therefore be legally actionable, then you should have that draft letter reviewed by a lawyer who specializes in employment law.

EMPLOYERS BEWARE:

You May Unknowingly Be Incurring Enormous Future Overtime Liabilities To Your Most Zealous Employees

Do you believe in letting your employees do their work on their own, without monitoring exactly when they do it or how long they take to do it? If so, then you may want to reconsider your laissez-faire approach, in light of the grave financial risks to which such an approach now gives rise.

This is because your encouragement, or even passive toleration, of overtime work can trigger very significant financial liabilities for you, unless proper precautions are taken. This was recently discovered by two of Canada's major banks when they found themselves slapped with multi-million dollar class action suits for unpaid overtime owing to many of their employees.

The first of those two cases concluded in 2016 with the employer – the Bank of Nova Scotia – having to pay 2,200 of its employees a whopping $38.7 million in accumulated overtime claims, representing an average of more than $17,500 in overtime pay per employee! This was on top of $12.5 million in legal fees which the bank was forced to pay to unsuccessfully defend against those employee claims, thereby bringing the total overall cost to the bank of rectifying the problem to over $50 million! In the second and potentially even more expensive case, the CIBC is now being sued by its employees for alleged unpaid overtime work totalling more than $500 million.

There is probably no aspect of employment law which is as widely misunderstood or as repeatedly breached by employers, HR professionals and their legal counsel, than the law governing overtime work. It has recently been estimated that between 70% and 90% of private sector employers in Ontario operate in constant, but unconscious, contravention of the mandatory overtime provisions in the *Employment Standards Act (ESA)*. By unwittingly operating in this way, these employers are exposing themselves to the future risk of having to pay huge overtime claims and administrative penalties.

The vast majority of companies which regularly contravene Ontario's overtime laws do so out of ignorance of the law. However, as the adage goes, *'ignorance of the law is no excuse'*, particularly in employment law. Accordingly, if you want to avoid costly future overtime claims for your company, it is essential that you understand, and then completely discard, some of the following dangerous legal myths to which many owners and HR managers frequently, but inadvertently, subscribe in the management of their firm's human resources:

DANGEROUS MYTH # 1: Overtime pay must be authorized by the employer, otherwise the employee is not entitled by law to claim overtime pay.

This is false. Overtime pay must be paid to all employees who work overtime (unless they fall within an exempt category), *regardless of whether or not that overtime work was ever actually authorized*. This means that even an employee who works overtime *after being explicitly forbidden to do so* by his employer is nonetheless legally entitled to receive overtime pay! Under Ontario law, the employer is liable for, and must pay that employee, overtime pay for all hours worked in excess of the Ontario overtime threshold of 44 hours per week, even if that work was expressly forbidden by the employer.

As recently observed in the case of *Thunder Bay Regional Health Sciences Centre v Ontario Nurses Association*, Ontario courts have repeatedly held that *"the lack of authorization to perform [overtime] work [is] not … an impediment to the employee's claim to be paid for those hours of work."*

In practical terms, this means that the responsibility for ensuring that an employee does not work overtime, and thus does not get paid overtime, rests squarely on the employer. If you do not want your employees to work overtime, you must not only order them to stop, but *must see to it that they actually do stop their work*. Otherwise, all of those employees whose work spills over into overtime are automatically entitled, by law, to receive overtime pay from you for all of the overtime hours that they have actually worked.

DANGEROUS MYTH # 2: *Employees who earn a salary rather than an hourly wage cannot claim overtime pay.*

This too is false. In Ontario, all eligible employees who work in excess of 44 hours per week are entitled to overtime pay, regardless of whether they are

remunerated on an hourly basis or by a fixed annual salary. When it comes to overtime pay, there is absolutely no difference between a salaried employee and an hourly wage employee. In order to calculate a salaried employee's overtime pay divide the employee's weekly salary by 44 to determine the hourly wage. That hourly wage is then multiplied by 1.5 for each hour worked in excess of the 44 hour overtime threshold.

DANGEROUS MYTH # 3*: Managers and supervisors are not eligible to receive overtime pay.*

This is only partly true. Generally speaking, managers and supervisors are not eligible to receive overtime pay. However, many employees with the work title of "Manager" or "Supervisor" are exempted from this rule, and are therefore entitled to claim overtime pay for hours worked in excess of 44 hours per week. For managers or supervisors to be denied the right to claim overtime pay, they must actually *manage* other employees and must devote the greater part of their day to doing so. Under the *ESA*, managers or supervisors enjoy the right to claim overtime unless (1) *the majority* of their work is supervisory or managerial and (2) they execute those tasks *on a regular basis*. Accordingly, if your managers' jobs include both managerial and non-managerial tasks, it is important that you ensure that the majority of their tasks are truly managerial/supervisory in nature and that they conduct those tasks on a regular and constant basis. Otherwise, you may find yourself facing costly, and legally watertight, claims for overtime pay from your managers, legitimately seeking indemnification for the hundreds of overtime hours which they worked last year.

DANGEROUS MYTH # 4: *Employees can agree to contract out of working overtime and claiming overtime pay.*

This is untrue. It is illegal for an employee to contract out of his right to be paid overtime pay for hours worked in excess of 44 hours per week. This means that any agreement between an employer and employee not to claim overtime pay for overtime hours worked is legally invalid and totally unenforceable! Such an agreement is prohibited under subsection 5(1) of the *ESA*, which governs employment relations between all employees and provincially regulated employers in Ontario. Pursuant to subsection 5(1) and 22(1) of the *ESA*, employees cannot agree to work overtime hours at a rate lower than 1 ½ regular rate (which is the rate for overtime pay in Ontario) and any contractual agreement to do so is void. Nor can employees agree to reduce their regular rate for those hours worked in excess of the applicable overtime threshold. Ontario law makes any such agreement void and legally unenforceable.

DANGEROUS MYTH # 5: *An employee cannot agree to have paid time off instead of overtime pay.*

This too is untrue. The *ESA* explicitly stipulates that if the employer and the employee agree in writing, an employee can receive paid time off instead of overtime pay. This is at times referred to as "banked" time or "time off in lieu". If the employee has previously agreed to bank overtime hours, he or she must be given 1 ½ hours of paid time off work for each hour of overtime worked. Paid time off must be taken within 3 months of the pay week in which it was earned or, if the employee agrees in writing, within 12 months.

DANGEROUS MYTH #6*: Employers must always pay overtime for each overtime hour an employee works.*

This is not always true. Employers can avoid paying overtime for each overtime hour that an employee works by entering into a written agreement, referred to in Ontario as an *"averaging agreement",* and by obtaining the approval of the Director of Employment Standards. If signed by the employees and approved by the Ministry, an averaging agreement provides the employer with a temporary break from its obligation to pay time and a half for each hour of overtime worked. Pursuant to the averaging agreement, an employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks, at the end of which the employer can average the employee's hours of work and only pay the average of the overtime hours worked during those weeks. As described by the Ministry in its Interpretation Manual:

"*The employee and employer agree in writing to average the employee's hours of work over four-week periods. The employee works 48 hours the first week, 44 hours the second week, 40 hours the third week and 50 hours the fourth week*. *The employee's overtime hours will be determined by finding the average number*

of 45.5 hours per week ((48 + 44 + 40 + 50) divided by 4). Accordingly, the employee would be entitled to overtime pay in respect of 1.5 hours of overtime work per week within the four-week period. In the absence of an averaging agreement, the employee would have been entitled to four hours of overtime pay in the first week and six hours of overtime pay in the fourth week.[1]"

However, before the averaging agreement can be legally valid, there are a number of statutory conditions which the employer must meet, which are outlined in the *ESA*.

In 2016, the risk to your organization of being sued for unpaid overtime pay is *far greater* than in the past. Due to recent amendments made to the *ESA* in 2015, employees can now file claims to recover unpaid overtime going back for a period of *two years*. As a result, any employee who resigns or is terminated from your organization can insist that you pay him for all extra hours that he may have worked, but for which he was never paid, *during the final two years of his employment*. Because of these recent amendments to the law, the retroactive overtime claim of a single dismissed employee can easily end

up costing your organization tens of thousands of dollars, if not more, in the same way as happened earlier this year to the Bank of Nova Scotia.

To ensure that your organization is not amongst the many thousands of Ontario employers who have recently fallen victim to one of these six dangerous and potentially costly myths, and is not unwittingly breaching the overtime provisions of the *ESA*, you may find it wise to consult with a lawyer specializing in employment law to ensure that your overtime policies and practices fully comply with Ontario law.

[1.] Ontario, Employment Practices Branch, *Employment Standards Act 2000: Policy and Interpretation Manual*, vo.1 (Toronto: Thomson Carswell, 2007) at 12-30.

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

(Can you score 5 out of 5?)

IS IT TRUE THAT……?

1. When a consultant or contractor signs an agreement confirming that he is not an employee, this does *not* preclude him/her from subsequently claiming termination pay or severance pay from you. True / False

2. Whenever you terminate an employee, you only need to provide him/her with continued benefits coverage for the statutory notice period, as prescribed in the *Employment Standards Act.* True / False

3. An employee can usually be terminated once he/she has been continuously absent on disability leave for more than 2 years. True / False

4. You can safely let new employees sign their employment agreement after, rather than before, they arrive at the office for their first day at work. True / False

5. An employee cannot generally be punished for misconduct which he carries out while attending a private off-duty event or while writing online in the privacy of his own home, and such misconduct can only be sanctioned if it wholly undermines confidence in the employee's ability to do his work. True / False

(Answers on the back page of this Newsletter)

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

1. **True**. In determining whether or not a consultant or contractor is an employee, both the Ministry of Labour and the Courts look at the reality of your work relationship with that individual, and not just at the title which you and he have agreed upon. Accordingly, if he/she signs an agreement that confirms that he/she is not an employee, this does *not* necessarily preclude him/her from later successfully claiming termination pay or severance pay from you.

2. **False**. (Unless the employee signed an employment agreement containing an up-to-date and still legally enforceable termination clause) Where an employer terminates an employees' disability coverage before the expiry of the common law notice period, without his/her having executed a Release, the courts have ordered the employer to indemnify the employee for his/her losses sustained as a result of the premature discontinuance of the disability coverage prior to expiry of the common law notice period. In some cases, this has involved the employer having to pay the employee hundreds of thousands of dollars.

3. **False**. The courts have ruled that the employment agreement is only frustrated if and when there is actual evidence that the employee is unlikely to return to work in the foreseeable future. Without such evidence (or evidence of the employer's attempts to accommodate the employee to the point of "undue hardship"), the employer's termination of the disabled employee breaches the *Ontario Human Rights Code* and it thereby becomes potentially liable to the employee for very substantial damages.

4. **False**. When a new employee signs his/her employment agreement *after* rather than *before* starting work on his/her first day on the job, that employment agreement – along with any termination clause contained therein – is generally unenforceable at law, and not worth the paper it's written on!

5. **False:** In cases where the employers "brand" is significantly impacted, employers currently have the legal authority to dismiss employees even when their actions outside the workplace are totally unrelated to, and have absolutely no objective impact on, their actual ability to do their job.

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