

*Employment
Law Update*

Employment Accessibility Resource Network (EARN)

AGENDA

1. Termination Clauses
2. Federal Anti-Harassment Regulations
3. Workplace Vaccinations
4. Temporary Layoffs and the Pandemic
5. Employee Masking and Screening Requirements
6. Accommodation in the Hiring Process

Termination Clauses

...an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act.

***Machtinger v. HOJ Industries Ltd., 1992
CanLII 102 (SCC)***

The Two Standards for Misconduct

- **Statutory Standard:** Requires intentional, or wilful, misconduct on the part of an employee.

“has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”

- ss. 2(3) and 9(6): **O. Reg. 288/01**

The Two Standards for Misconduct

- **Common Law Standard:** Whether the trust inherent to an employment relationship has been lost.
 - A more objective test than statutory standard
 - Can be found absent intent on the part of a worker to commit misconduct
 - Common Law Standard is typically referred to as “cause” or “just cause” for dismissal

Termination Clauses at Risk

Example 1:

[Employer] may terminate your employment at any time without notice for **cause**. If your employment is terminated for **cause**, [Employer]'s **sole obligation** will be to **pay you accrued Salary and vacation pay**, if any, earned by you prior to the date of termination.

Termination Clauses at Risk

Example 2:

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

Termination Clauses at Risk

Sewell v. Provincial Fruit Co. Limited, 2020 ONSC 4406

Second, applying Waksdale, I find that the “Termination for Just Cause” provision of the contract was illegal insofar as it contracted around the ESA requirement to provide notice except in cases where an employee engaged in “willful misconduct.”

Termination Clauses at Risk

Example 3:

[Employer] may terminate your employment at any time for just cause, as defined at common law, without notice and you shall not be entitled to any notice or compensation in lieu of notice **unless required by the *Employment Standards Act, 2000.***

New Federal Anti-Harassment Requirements

- Effective **January 1, 2021** federally regulated employers must have in place an anti-harassment program
- Details can be found in the new *Work Place Harassment and Violence Prevention Regulations, SOR/2020-130*

New Federal Anti-Harassment Requirements

- Program requirements include:
 - Conducting a **joint workplace assessment** as to risk factors for harassment and violence in the workplace;
 - Having a written harassment and violence prevention **policy**;
 - Developing a **resolution process** to address complaints of workplace harassment and violence; and
 - **Training staff** on the employer's new harassment and violence prevention program.

Workplace Vaccinations

- Can employees be forced to receive a vaccine?
- Can employees be suspended from work for refusing a vaccine?
- Can employees be dismissed from work for refusing a vaccine?

Temporary Layoffs and the Pandemic

- Old Rules (Federal):
 - Layoffs up to **3 months** (without an anticipated recall date); or
 - Layoffs up to **6 months** (if notice of an anticipated recall date is provided).
- Old Rules (Ontario):
 - Layoffs of up to **13 weeks in any 20-week** period; or
 - Layoffs up to **35 weeks in any 52-week** period, subject to certain criteria (i.e. continuing employee benefits, etc.)

Temporary Layoffs and the Pandemic

- **New Rules (Federal):**
 - If worker laid off for a period of 3 months or less
 - before March 31, 2020, the time is extended by 9 months after the day on which it would otherwise end (i.e. providing for a 12 month layoff period); or
 - between March 31 to December 31, 2020, the time is extended until March 31, 2021.
 - If worker laid off with an expected recall date
 - before March 31, 2020, the set recall date may be extended by 9 months or to March 31, 2021 (whichever is earlier); or
 - between March 31 and December 31, 2020, the set recall date may be extended until to March 31, 2021.

****Rules currently do not apply to any layoff that begins after December 31, 2020****

Temporary Layoffs and the Pandemic

- New Rules (Ontario):
 - Workers may be placed on unpaid deemed Infectious Disease Emergency Leave (“**IDEL**”) until **July 3, 2021**
 - This special type of leave is effectively an unpaid layoff by another name
 - After the end of IDEL, workers can still be placed on a normal layoff in accordance with ESA rules
 - Any temporary layoff begun on March 1, 2020 or later is automatically considered to be IDEL (i.e. the layoff clock is reset)

Employee Masking and Screening Requirements

- **Screening:** Employers should screen, before entry, all workers and essential visitors to the workplace for COVID-19 symptoms and risk factors.
- **Masks:** Masks should be worn in any indoor work setting where physical distancing cannot be maintained and in any indoor public space (i.e. retail floor, office lobby, etc.). Some persons are, however, exempt from having to wear a mask.

Employee Masking and Screening Requirements

- **Monitor:** All employers should have one (or more) persons tasked to monitor and quickly act on any changing public health guidance or legislation.
- **Implement:** COVID-19 Workplace Safety Plan (all Ontario employers operating during a lockdown must have a written safety plan in place).

Interview Process Best Practices

- Carefully consider:
 - the content of the job advertisement.
 - where the advertisement is posted and to whom (if anyone) it is targeted.
- Offer and provide accommodation for interview or testing.

Interview Process Best Practices

- Use a script and ensure questions are **rationally connected** to the necessary skills and requirements of the position.
- Have a written job description for the role.
- Put a rubric in place to ensure objectivity in assessment.
- Have an independent person at the interview if possible (i.e. a union steward) or have present two representatives for the employer.

Accommodating Disabilities in Interview Tests

- **Example:** A government employer invites 30 candidates to come in to write a written test for a position in the Communications department.
- Candidates are told in advance that they will have one hour to read materials and write a brief or a press release.
- They are asked to identify any needs for accommodation.
- One person identifies a **need for a computer with screen-reading software**, and another asks for **more time to do the tasks**. The employer has enough time to ask for more information, if needed, and to plan to meet these needs so candidates can be fairly assessed on their abilities.

Accommodating Disabilities in Interview Tests

- **Example:** A person applies for a position online and is asked to take part in a telephone interview.
- The person sends an e-mail asking that the interviewer call via TTY as an accommodation in the interview process.
- In response, she is told that she is unsuitable for the position because the position involves making telephone calls to customers.
- The employer may be found to have failed in its **duty to accommodate**. Also, the applicant has **been denied an opportunity to demonstrate her ability** to meet the essential duties of the position. This is discriminatory.

***Positive
Discrimination in
Hiring (Special
Programs)***

Ontario Human Rights Code

14 (1) A right...is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity...

Canadian Human Rights Act

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program...designed to prevent disadvantages that are likely to be suffered by...any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination...

Assessing Special Programs

- **Purpose:**

1. Relieve hardship or economic disadvantage;
2. Help disadvantaged people or groups to achieve, or try to achieve, equal opportunity; or
3. Help eliminate discrimination.

- **Criteria:**

- Advance equality
- Address genuine disadvantage
- Be tailored to meet the actual needs of the disadvantaged group
- Impact on third parties must be considered
- *Temporary in nature*

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