2020 EMPLOYMENT, LABOUR AND EQUALITIES SEMINAR

NOVEMBER 10, 2020

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AGENDA

TIME	TOPIC	SPEAKERS
9:00 am	Introduction	Neena Gupta
9:10 am - 10:10 am	Top Legal Developments of 2020	Various Speakers
10:10 am - 10:20 am	**BREAK**	
10:20 am – 10:35 am	COVID-19 - Changes to the *Employment Standards Act, 2000*	Amy Derickx and Andre Poulin-Denis
10:35 am – 10:50 am	Human Rights – Accommodation in the Era of COVID-19	John Peters

AGENDA - CONTINUED

TIME	TOPIC	SPEAKERS
10:50 am- 11:05 am	Exceptions to Border Closure and Quarantine	Bill MacGregor
11:05 am- 11:20 am	Flexibility in Your Contracts – What COVID-19 taught us	Chris Andree
11:20 am – 11:30 am	**BREAK**	
11:30 am – 11:55 am	Panel Q&A	Mark Josselyn, Neena Gupta, Craig Stehr and Bettina Burgess
11:55 am	Closing, Thank You & HRPA Code	Elisa Scali

TOP LEGAL DEVELOPMENTS OF 2020

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THE ATTACK ON CONTRACTS

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WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- Short-service employee terminated on a without cause basis
- Sued for wrongful dismissal
- Contract had strong ESA clause
- Argued both “cause” and “without cause” provision unenforceable
- “without cause” clause likely enforceable on its own, but
- “ with cause” provision violated the *Employment Standards Act*, 2000, SO 2000 c 41 (“ESA”)
- Employer argued severability clause to save “without cause” provision

WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- Lower court - Superior Court - held “Cause” provision was **unenforceable**, but did not impact “without cause” provision
- Held that common law reasonable notice was sufficiently rebutted and ESA applied
- Court of Appeal disagreed
- Termination provisions should be interpreted as a whole
- Severability clauses cannot save termination provisions, **if even one part invalid, all is invalid**
- **Common law prevailed**

WAKSDALE v. *SWEGON NORTH AMERICA INC.*, 2020 ONCA 391

- **WARNING**
  - Most employment agreements with “cause” termination clauses may be invalid
  - Ensure contracts are updated for new employees and employees being promoted
  - Contract templates need to be reviewed annually, if not more frequently

GROVES v. *UTS CONSULTANTS INC.*, 2020 ONCA 630

- Founder of company sold business
- Continued as employee under new ownership until termination in 2017
- Turned on termination provision in employment agreement – “calculated from the date of this letter…”
- Superior Court held common law notice rights not limited
- Prior service could not be waived
- Termination provision unenforceable

GROVES v. *UTS CONSULTANTS INC.*, 2020 ONCA 630

- Awarded 24 months notice for entire period of service
- Court of Appeal dismissed appeal
- Statutory and common law liability unaffected by Share Purchase Agreement or Release given at time of closing

GROVES v. *UTS CONSULTANTS INC.*, 2020 ONCA 630

- **Implications:**
  - Reconsider standard form agreements used in Share Purchase transactions
  - Require post-dated **resignations** from principal
  - Consider indemnity from Seller for actions brought by principal relating to termination of principal that extends beyond normal indemnity period

MATTHEWS v. *OCEAN NUTRITION CANADA LTD.*, 2020 SCC 26

- Key employee since 1997 as Vice President, New and Emerging Technologies
- Aspects of role removed in 2011
- Clearly personality conflict between new management and Matthews
- Matthews resigned and brought claim for constructive dismissal
- At issue were incentive and variable compensation entitlements, including stock options

MATTHEWS v OCEAN NUTRITION CANADA LTD., 2020 SCC 26

- Language requiring employee to be “full time” or “active” ineffective
- Exclusion clause did not cover “unlawful” termination
- Even if it did, it would still be ambiguous

MATTHEWS v. *OCEAN NUTRITION CANADA LTD*., 2020 SCC 26

WARNING

- reinforces that reasonable notice (or compensation/damages for) for ALL compensation elements is *always the starting point in every analysis*;

- implicitly approves lower courts' ongoing efforts to demand *virtually perfect* drafting, processes and conduct from employers;

- game-changer is recognition of an **(as yet undefined) employer *duty* to draw attention to harsh forfeiture provisions, *even if those provisions are common or "industry standard*"**

BATTISTON v. *MICROSOFT CANADA INC.*, 2020 ONSC 4286

- Bonus based on performance appraisal
- Policy did not remove common law entitlement to bonus during notice period
- Poor performance did not remove common law entitlement to bonus during notice period
- Interestingly, poor performance in fiscal year 2018 nullified bonus entitlement for the year worked, but did not nullify claim during notice period.

BATTISTON v. *MICROSOFT CANADA INC.*, 2020 ONSC 4286

- Stock Award Agreement unambiguously excluded right to unvested shares following termination
- Court found provisions harsh and oppressive
- Provisions were not sufficiently brought to employee's attention, even though in "click through" acceptances on numerous occasions
- Therefore entitled to damages for unvested shares

BATTISTON v. *MICROSOFT CANADA INC.*, 2020 ONSC 4286

- **Implications:**
  - Bring termination provisions limiting employees' rights to their attention
  - **Corporate documents need to be redrafted**
  - Failure to notify **explicitly** will nullify an effective termination provision
  - Keep records of presentations and signed agreements
  - Be careful of "click through" agreements

ENGLISH v. *MANULIFE FINANCIAL CORPORATION*, 2019 ONCA 612

- Employee in her 60s with 9 years of service
- Employer announced new computer system
- Employee gave notice of retirement, explaining new computer system her concern
- Supervisor assured her she could change mind
- Employer announced no longer implementing new computer system
- Employee rescinded retirement notice

ENGLISH v. *MANULIFE FINANCIAL CORPORATION*, 2019 ONCA 612

- Superior Court dismissed employee's wrongful dismissal claim
- Court of Appeal overturned decision
- Retirement notice was not clear and unequivocal
- Supervisor had assured her she could change her mind
- Twelve months' pay in lieu of notice awarded

ENGLISH v. *MANULIFE FINANCIAL CORPORATION*, 2019 ONCA 612

- **Implications:**
  - Train employees never to give mixed messages
  - **Accept resignation explicitly and unequivocally in writing**
  - Be able to prove reliance on resignation (e.g. hiring or training new people)

UBER TECHNOLOGIES INC. v. *HELLER*, 2020 SCC 16

- Ontario Court of Appeal decision found arbitration agreement in standard form agreement unenforceable
- Arbitration agreement held unconscionable (very expensive fees to even commence arbitration) in the Netherlands!
- Agreement also allegedly improperly contracted out of ESA, as gig workers allegedly employees
- Appealed to Supreme Court of Canada

UBER TECHNOLOGIES INC. v. *HELLER*, 2020 SCC 16

- Ontario courts can determine validity of arbitration agreement in employment relationships
- Majority held there was an inequality in bargaining power
- Improvident bargain based on upfront administrative fees to arbitrate in the Netherlands
- Court did not address whether agreement breached the ESA or whether gig workers actually employees

UBER TECHNOLOGIES INC. v. *HELLER*, 2020 SCC 16

- **Implications:**
  - Arbitration agreements may be invalid, especially where there are significant barriers to accessing justice (cost, distance, complexity)
  - Court of Appeal's finding that agreement breached ESA is current law, **but was not dealt with by SCC**

THURSTON v. *ONTARIO (CHILDREN'S LAWYER)*, 2019 ONCA 640

- Sole practitioner lawyer
- Signed fresh fixed term contract each year for 13 years
- OCL had right to terminate without notice
- OCL work generated about 40% of lawyer's annual income
- Independent contractor or dependent contractor?

THURSTON v. *ONTARIO (CHILDREN'S LAWYER)*, 2019 ONCA 640

- Motion judge found in contractor's favour
- 40% earnings seen as sufficient to meet economic dependency standard
- Court of Appeal disagreed and dismissed the case
- 40% insufficient to meet minimum economic dependency standard
- "Near exclusivity" requires substantially more than 50%

THURSTON v. *ONTARIO (CHILDREN'S LAWYER)*, 2019 ONCA 640

- **Implications:**
  - Significant loss of income insufficient to imply dependent contractor status
  - Economic dependence must be "substantially more than the majority" of contractor's income

DECISION NO. 1227/19, 2019 ONWSIAT 2324

- Employee resigned and brought a constructive dismissal claim based on harassment and bullying in the workplace
- Employer argued right of action statute barred by *Workplace Safety and Insurance Act* ("WSIA")
- Tribunal sided with **employer**
- Facts of case inextricably linked to claim for mental stress under WSIA

DECISION NO. 1227/19, 2019 ONWSIAT 2324

- **Implications:**
  - Right to bring an action for wrongful dismissal may be removed by WSIA where damages flow from work injury
  - “Fundamental nature of the action” will be considered

AODA REMINDERS

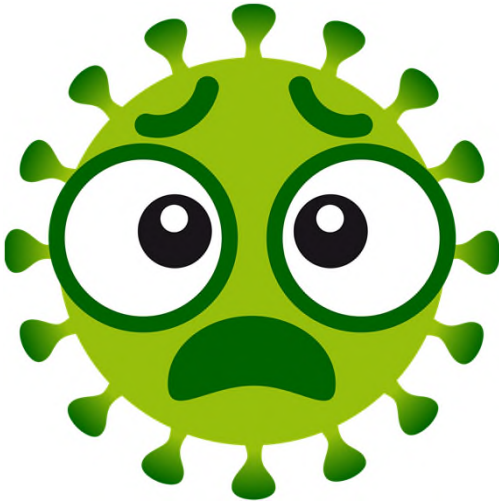
- Companies with 20+ employees must report every 3 years on their progress under the *Accessibility for Ontarians with Disabilities Act, 2005.*
- December 31, 2020 deadline has been moved to **June 30, 2021** due to COVID-19
- Use the additional time to make sure that you are compliant and ready!

AODA REMINDERS

- Large employers (50+ employees in Ontario)
- Control website (directly or via contract)
- Must meet WCAG 2.0 Level AA standard, except 2 technical exceptions:
  - (i) success criteria 1.2.4 Captions (Live)
  - (ii) success criteria 1.2.5 Audio Descriptions (Pre-recorded)
- Defence of “where meeting the requirement is not practicable” – no AODA case law
- Unclear whether it applies to portions of website arguably not available to public (i.e. requiring specific log-in credentials) – no AODA case law

INFECTIOUS DISEASE EMERGENCY LEAVE…

Who is eligible – continued:

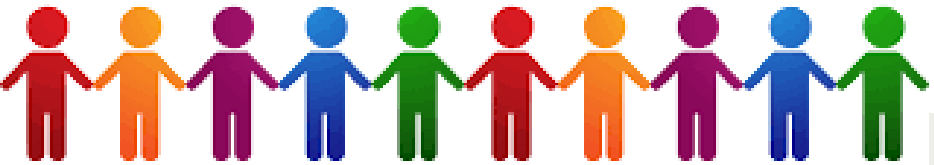


- Employees providing care or support to a specified individual for a reason related to COVID-19;
    - For e.g. many specified family members or a person considered to be like a family member.
    - a school or daycare closure.
    - an employee does not send their child to school or to child care because of a concern that the child will come into contact with COVID-19.
- Employees prevented from returning to Ontario because of travel restrictions.

INFECTIOUS DISEASE EMERGENCY LEAVE…

What are the statutory rights?

- Employers cannot threaten, fire, or penalize in any way an employee who takes or plans on taking an IDEL.
- Think of it this way, employees who take IDEL are generally entitled to the same rights as employees who take pregnancy or parental leave:
  - the same job the employee had before the leave began (or a comparable job, if the employee's old job no longer exists);
  - the right to be free from penalty/reprisal;

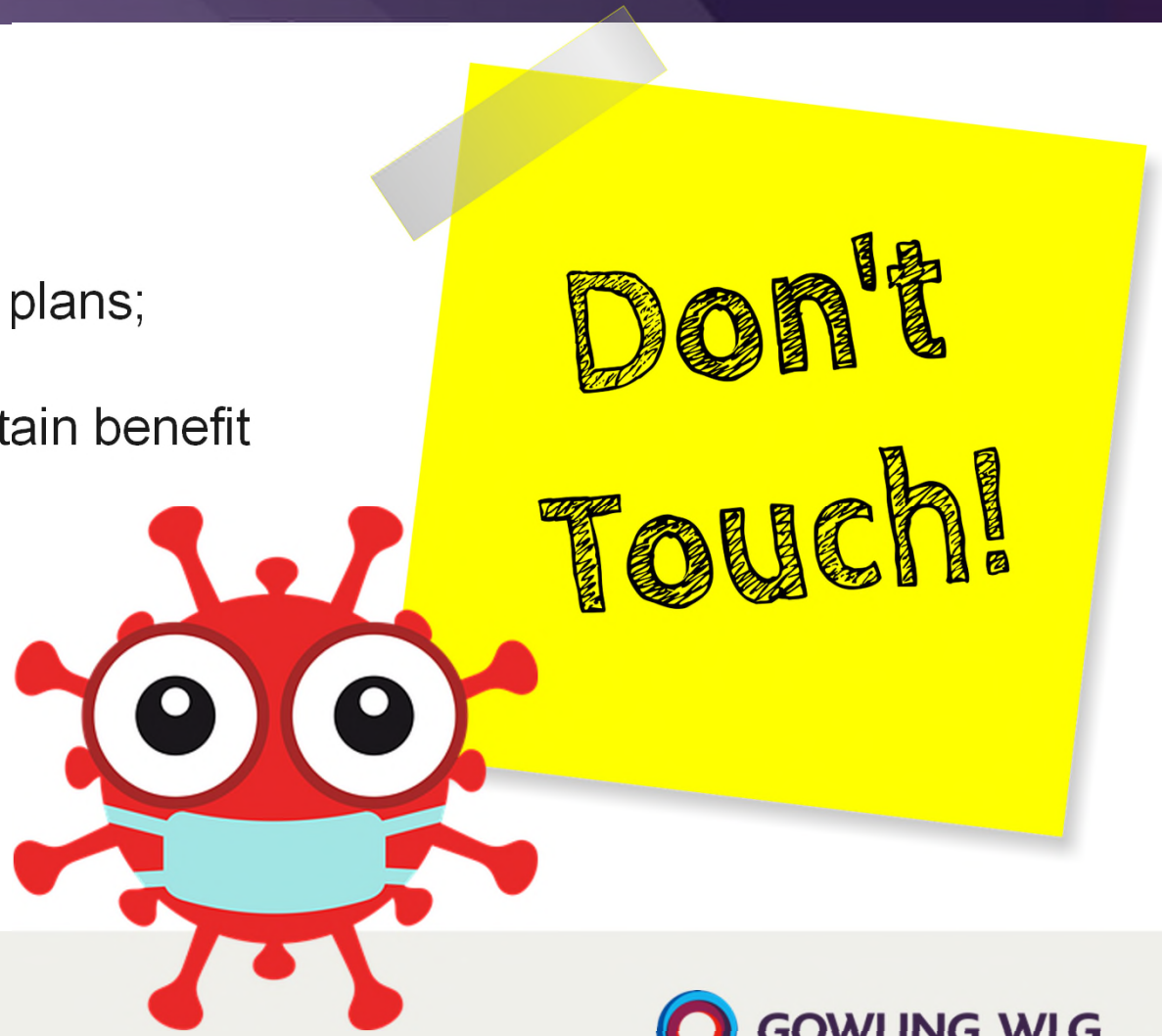


INFECTIOUS DISEASE EMERGENCY LEAVE…

What are the statutory rights – continued:

- the right to continue to participate in benefit plans;

  For e.g. right to continue to take part in certain benefit plans offered, including:
  - pension plans;
  - life insurance plans;
  - accidental death plans;
  - extended health plans; and
  - dental plans.



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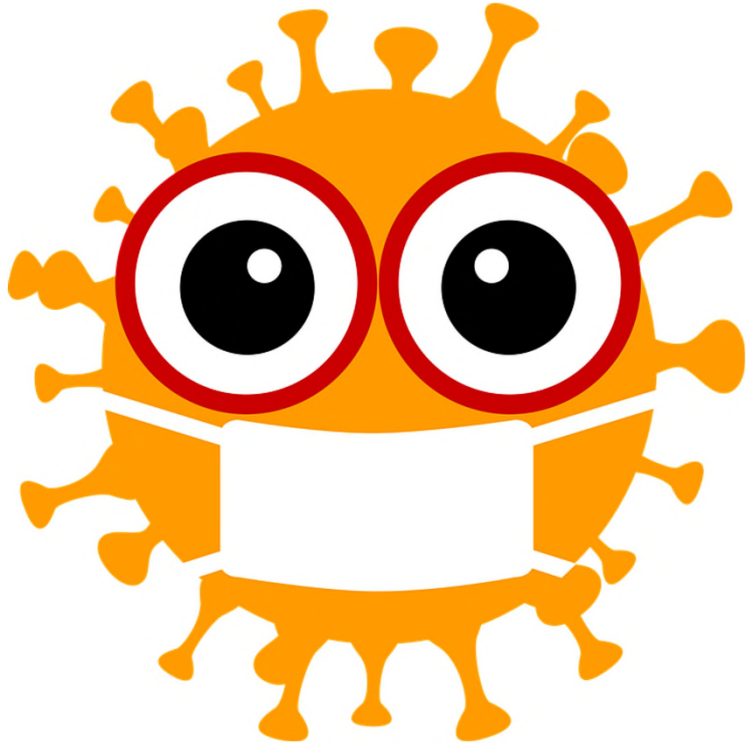
INFECTIOUS DISEASE EMERGENCY LEAVE…

What are the statutory rights – continued:

- The employer must continue to pay its share of the premiums for any plans that were offered before the leave, *unless the employee tells the employer in writing that they will not continue to pay their own share of the premiums*

- The right to earn credits for length of employment, length of service, and seniority.



INFECTIOUS DISEASE EMERGENCY LEAVE…

How long is IDEL?

- There is no specified limit to the number of days an employee can be on IDEL.
- IDEL absences do not have to be taken consecutively. Employees can take the leave in part days, full days, or periods of more than one day.

INFECTIOUS DISEASE EMERGENCY LEAVE…

Notice of IDEL?

- Notice of IDEL before starting the leave should be provided (wherever possible).
- If advance notice cannot be provided, the employee must inform the employer as soon as possible after starting the leave.
- Notice can be given in writing or orally.
- There is no loss of the statutory right for failure to give notice.

INFECTIOUS DISEASE EMERGENCY LEAVE…

Evidence of Eligibility?

- Evidence *(reasonable in the circumstances)* that the employee is eligible for IDEL, but employers cannot require an employee to provide a certificate from a physician or nurse.

- "Reasonable in the circumstances" will depend on all the facts of the situation, such as:
  - the duration of the leave
  - whether there is a pattern of absences
  - whether any evidence is available and the cost of the evidence.

- Employers are not prohibited from requiring medical notes in the context of issues such as return-to-work situations or for accommodation purposes.

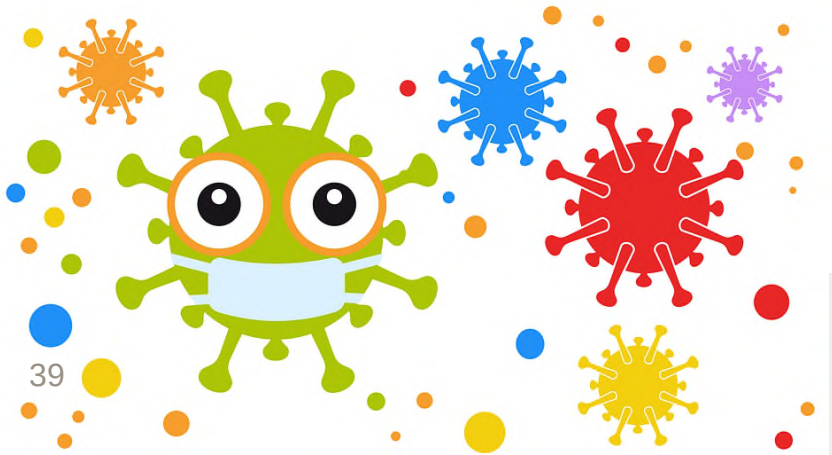
IDEL RETROACTIVITY (…If I Could Turn Back Time…)

- Under the Regulations, IDEL can be retroactive to January 25, 2020.
- An employee can retroactively designate absences as of January 25, 2020 if the reason for the absence meets the IDEL criteria.
- If an employee was fired on or after January 25, 2020 because they were absent from work for a reason protected by IDEL, the employer is required to reinstate the employee to the position the employee most recently held if it still exists (or to a comparable position if it does not) as of March 19, 2020.

TRANSITION FROM LAYOFF TO IDEL

- From March 1, 2020 to January 2, 2021, non-unionized employees who received layoff notices for reasons related to COVID-19 are not considered to be laid off under the ESA, but on deemed IDEL.

- The layoff clock for the employee is “frozen” during that time, which prevents a termination or severance of employment from occurring because a layoff exceeds the length of a temporary layoff (13 weeks or 35 weeks).



CONSTRUCTIVE DISMISSAL & LAYOFF

Constructive Dismissal:

- The Regulation establishes that there is no constructive dismissal under the ESA where a employer temporarily reduces or temporarily eliminates a non-unionized employee's wages or hours of work for reasons related to COVID-19.

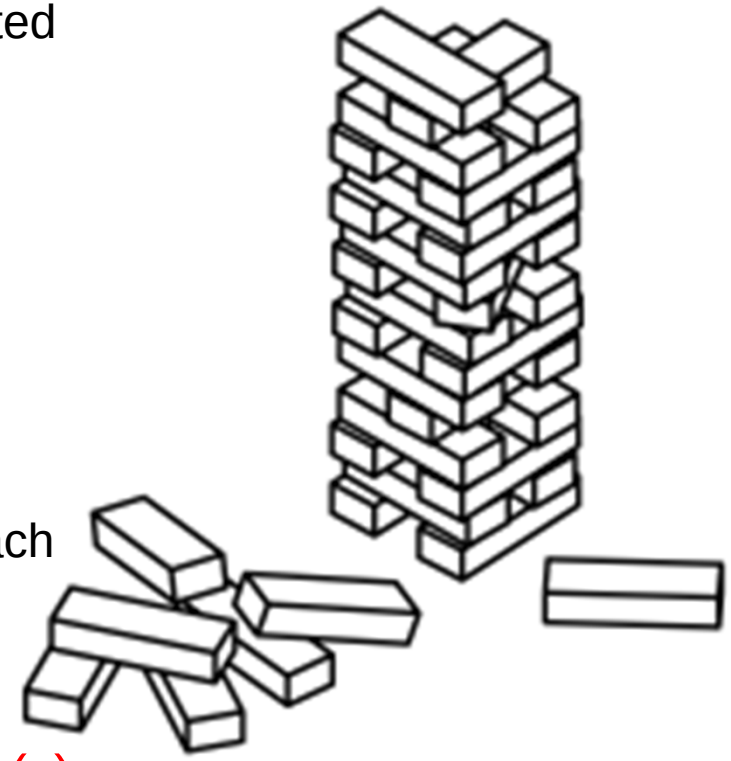
Layoff and Constructive Dismissal only affect statutory rights:

- The Regulation only suspends layoff and constructive dismissal under the ESA.
- These rules do not address whether a layoff or constructive dismissal occurred pursuant to a contractual right or at common law, but may be influential on a judge's thinking

IDEL & STACKING OF LEAVES

There are MANY different types of leaves under the ESA including (but not limited to):

- sick leave
- family responsibility leave
- family caregiver leave
- family medical leave
- critical illness leave
- bereavement leave



- An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

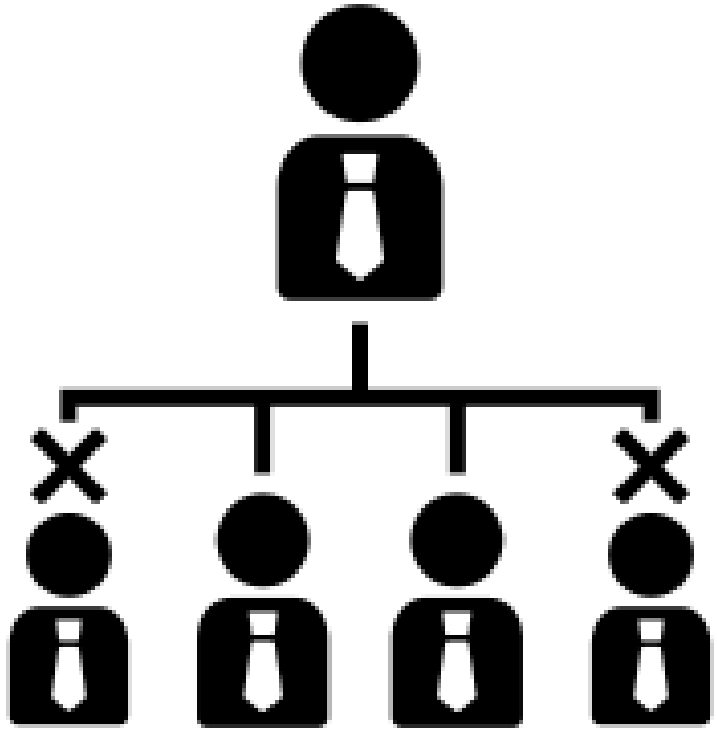
- TAKEAWAY: So long as eligibility criteria is met for the relevant leave(s), employees can stack leaves.

TERMINATION ON IDEL

- If an employer places an employee on a deemed IDEL, their position may be terminated.

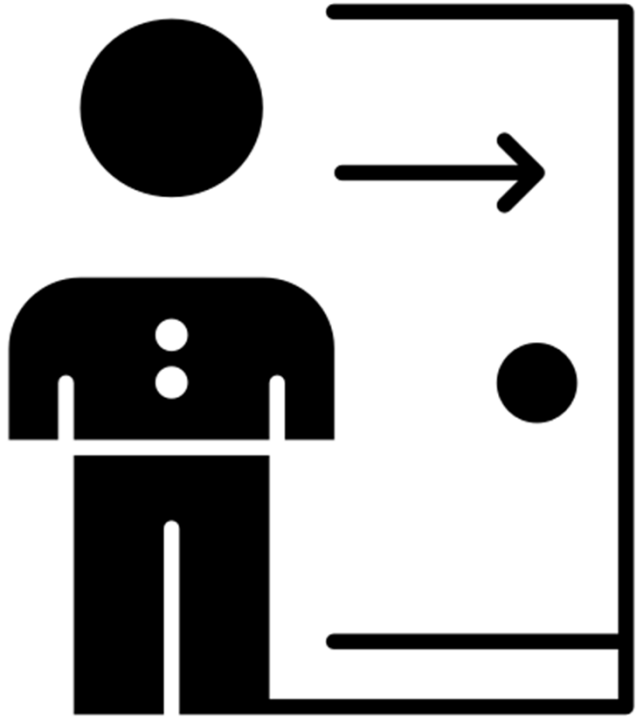
- The following employees are not deemed to be on an IDEL, even if they meet the qualifying criteria:

  - Employees who have been given written notice of termination in accordance with the ESA are not deemed to be on IDEL during the notice period;



TERMINATION ON IDEL

- CONTINUED: The following employees are not deemed to be on an IDEL, even if they meet the qualifying criteria:
  - Employees whose employment was terminated as the result of a temporary layoff exceeding the period of temporary layoff or as the result of a constructive dismissal, where the termination occurred prior to May 29, 2020 (the date the regulation was filed).



HUMAN RIGHTS

ACCOMMODATION IN THE ERA OF COVID-19

John Peters, Partner, Ottawa Office

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Emergency Leave: Declared Emergencies and Infectious Disease Emergencies

50.1 Leave of absence without pay

(1.1) An employee is entitled to a leave of absence without pay if the employee will not be performing the duties of his or her position,

(b) because of one or more of the following reasons related to a designated infectious disease:

(i) The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.

(ii) The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease.

(iii) The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

(iv) The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

(v) The employee is providing care or support to an individual referred to in subsection (8) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.

(vi) The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario.

(vii) Such other reasons as may be prescribed. 2020, c. 3, s. 4 (1).

ONTARIO HUMAN RIGHTS CODE
DEFINITIONS RE: PARTS I AND II

s.10 “disability” means

a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

b) a condition of mental impairment or a developmental disability,

c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

d) a mental disorder, or

e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

“family status” means the status of being in a parent and child relationship; (“état familial”)

ONTARION HUMAN RIGHTS CODE
DEFINITIONS RE: PARTS I AND II

Constructive discrimination s. 11

(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

1) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

2) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any

3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

CANADA (ATTORNEY GENERAL) V. JOHNSTONE
2014 CAF 110 (CANLII), [2015] 2 RCF 595

Four Part Tests to establish *prima facie* discrimination in the workplace based on family status.

The complainant must establish:

1. That the complainant is in fact responsible for the maintenance and supervision of the child;

2. There is an obligation which engages the complainant's legal responsibility towards the child and not just person choice;

3. That reasonable efforts have been made to meet his custody obligations by exploring reasonable alternatives; and

4. That the controversial rules governing the workplace impede in a more than negligible or insignificant manner.

COVID-19 – BORDER CLOSURES AND QUARANTINE

William (Bill) MacGregor, Partner, Waterloo Region

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HOW COVID-19 IS AFFECTING IMMIGRATION PROGRAMS

- **Canada's immigration/work permit programs remain open!**
  - But processing times and options have been affected
  - Temporary policies address some issues e.g. fast tracking change of employer
- **New employer compliant rules in IRPA**
  - Requirement to pay foreign worker during quarantine
- **Today's focus is on travel restrictions, the quarantine and exemptions**

TRAVEL RESTRICTIONS AND EXEMPTIONS

- **Governed by OICs and policy guidelines**
- **Travel from U.S. to Canada v. from all other countries**
  - Entry from U.S. must be non-discretionary
  - Entry from non-U.S. locations requires a travel restriction exemption
- **Exemptions for Travel from non-USA Locations to Canada:**
  - Work permit holders and work permit approvals
  - Group travel exemption for specialists required “to install, inspect, maintain or repair equipment necessary to support critical infrastructure”
  - Public Health (PHAC) and National Interest travel exemptions
- **Travel to the U.S. from Canada: entry by air v. entry by land**

MANDATORY QUARANTINE AND EXEMPTIONS

- **Everyone entering Canada must quarantine for 14 days**
  - Must have a quarantine plan
  - As of November 21, must use ArriveCAN App if entering by air
- **Quarantine Exemptions**
  - CBSA's jurisdiction to grant
  - Cross-border transporters
  - Crossing regularly to go to normal place of work
  - Specialists who will install, inspect, maintain or repair equipment necessary to support critical infrastructure IF there is rationale for immediacy and for inability to plan for quarantine
- **Employer compliance requirements and inspections**

CONCLUSION

- Canada’s immigration and work permit programs remain open
- Employers can still hire foreign workers though there may be processing delays
- Travel and quarantine restrictions must be carefully managed
- Exemptions to travel restrictions allow work permit holders and some other specialists to travel to Canada
- OICs and policies will continue to evolve so always check latest rules

FLEXIBILITY IN YOUR CONTRACTS

Chris Andree, Partner,
Waterloo Region Office

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FLEXIBILITY IN YOUR CONTRACTS

- **Contractual right to enforce a modification to the status quo**
- **Not constructive dismissal**
  - Not the unilateral change to a fundamental term
- **Rather, it is the enforcement of a term of the contract of employment**
- **Strictly interpreted**
- **Must ensure the agreement/ term is enforceable**
  - Consideration

FLEXIBILITY IN YOUR CONTRACTS

- **Temporary Layoff**
  - Must create the right in the contract of employment.
  - ESA provisions do not create the right
  - ESA provisions stipulate how you may exercise the right
- **Infectious Disease Emergency Leave**
  - COVID-19 related layoffs have been converted to deemed IDEL

FLEXIBILITY IN YOUR CONTRACTS

- **Reduction in Wage/ Salary**
  - Right to be strictly interpreted
  - Cannot be targeted in an attempt to effect a termination
  - Tips
    - Cap the reduction
    - Across the board at a comparable level
  - Barrier to recruitment
- ***Magyarosi v. Berg Chilling Systems Inc*., 2002 CarswellOnt 3148, 117 A.C.W.S. (3d) 99**

FLEXIBILITY IN YOUR CONTRACTS

- **Incentive Compensation/ Bonus Plans**
- **Matheson v Erie Mutual Fire Insurance Co., 2016 ONSC 704**
  - 30% reduction in commission
- **Wiltse v Seastar Chemicals ULC, 2020 BCSC 658**
  - Capping PIP and substituting MIP were unacceptable
  - Court acknowledges that the “change” language was deficient, not the concept of changes
- **Snell v. Tenneco Canada Inc., 1992 CarswellBC 855, BCSC**
  - Law implies a term of reasonableness

FLEXIBILITY IN YOUR CONTRACTS

- **Change in Duties**
  - Demotion
  - Expansion
- **Change in Location of Operations**
  - Working Remotely
- **Hours of Work/ Shifts**
  - Family Status issues
- **Suspension**