

Day 1 – Ontario Employment and Labour Spring webinar series

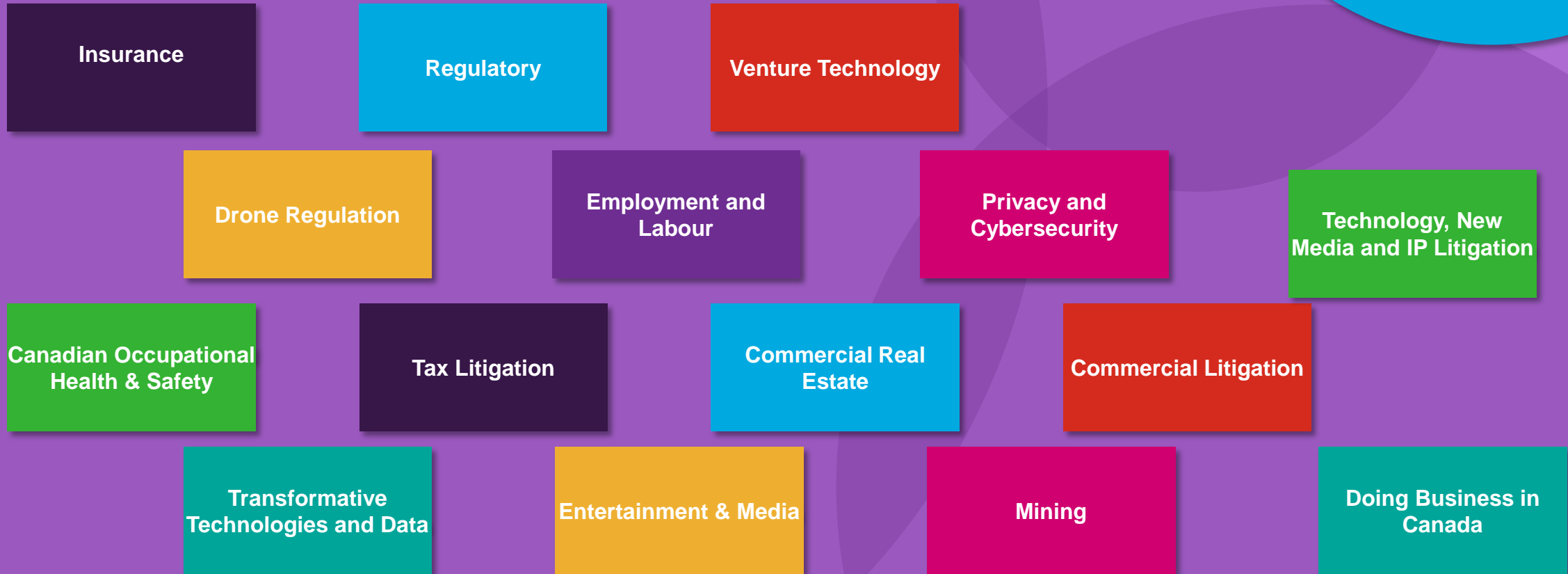
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Day 1 – Ontario Employment and Labour Spring webinar series

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Return to the workplace – 2021 Edition

Employer compliance

Adrian Miedema, Partner, Toronto

State of emergency ended

- State of Emergency ended June 2, 2021
- Stay at Home Order ended June 2, 2021
- Operative legislation is now Re-opening Ontario Act
- Key regulation: 82/20, “Rules of Areas in Shutdown Zone and at Step 1”
- All of Ontario now in “Step 1”

General rules at Step 1

- Operate business in compliance with public health advice, recommendations and instructions
- Comply with OHSA
- Conduct screening:
 - Post signs
 - Actively screen every person who works there
- Ensure employees work remotely, unless the nature of their work requires them to be on-site at the workplace
- Ensure employees wear masks (existing exceptions continue to apply – e.g. working in own office, distanced)
- Have safety plan

Reporting obligations

- Continue to report all cases of workplace COVID-19 infections to:
 - Ministry of Labour, Training and Skills Development (under OHSA)
 - WSIB
 - Local public health (where required)
 - Be mindful of “Section 22” Orders – e.g. Toronto and Peel

“Forcing” employees to work from home or from office?

- When possible, may employers “force” employees to return to office?
- May employers “force” employees to keep working from home?

Likely issues in office when employees return

- Different levels of concern about distancing etc.
- Discussions about vaccination
- Vacation scheduling issues
- Harassment claims – provide refresher training?
- Requests for accommodation
- Mentoring / collegiality

Mandatory vaccination?

- Can the employer require employees to be vaccinated before returning to office?
- Can employers have different rules for vaccinated employees?

Charges and Fines

- Maximum fines
- Charges laid

Vacation pay – What you need to know, now

Catherine Coulter, Counsel, Ottawa

Claire Browne, Associate, Toronto



Overview

Part I: Vacation pay in Ontario

- Statutory vacation entitlements in Ontario
 - “Vacation Time” vs. “Vacation Pay”
- Who is entitled to take statutory vacation?
- Definition of “wages”
- When vacation is required to be taken
- Forfeiture of unused vacation

Part II: Canada Labour Code vs. Employment Standards Act, 2000 (Ontario) (the “ESA”)

Part II: Vacation pay issues – How to fix them

- Limitation Periods
- Best Practices

Statutory entitlement to vacation pay (Ontario)

- Employees are entitled to vacation time and vacation pay
- Vacation time
 - Employees with less than 5 years of service = minimum 2 weeks of annual vacation time
 - Employees with 5 or more years of service = minimum 3 weeks of annual vacation time
- Vacation Pay
 - Employees with less than 5 years of service = calculated on the basis of 4% of total wages
 - Employees with 5 or more years of service = calculated on the basis of 6% of total wages
- Note: More vacation time and/or vacation pay may be given to employees, however less vacation time and/or vacation pay cannot be given to employees

What are “wages”?

- “Wages” includes most monetary compensation paid by an employer to an employee
 - Base Salary
 - Overtime
 - Commissions
 - Non-discretionary (“incentive”) bonuses
- What is a “discretionary” bonus?
 - Two requirements:
 - (i) Dependent on the discretion of the employer; and
 - (ii) Is not related to hours, production or efficiency

Who is entitled to take statutory vacation?

- Most Ontario employees are entitled to statutory vacation time and vacation pay including:
 - Full-time employees
 - Part-time employees
 - Salaried employees
 - Hourly employees
 - Term contract employees
- However, certain employees are exempt from the ESA vacation with pay entitlements:
 - Various professionals
 - Various students in training
 - Certain types of salespersons
 - Teachers defined in the *Teaching Profession Act*
 - Some agricultural workers

Is vacation required to be taken?

- Statutory vacation time must be used by the employee:
 - 1) During the year in which it is earned; or
 - 2) Within 10 months after the year in which it is earned
- What if an employee does not want to use up their vacation time?
 - Timing of vacation is ultimately in the control of employers (not employees)
 - Employers have control over ensuring that all employees do not go on vacation at the same time
 - Employers can force an employee to take vacation if they otherwise refuse to take their vacation in a given entitlement year

Can unused vacation be forfeited?

- Remember that employers are required to provide employees with at least statutory vacation entitlements.

Therefore:

- Statutory vacation pay cannot be forfeited under any circumstances. In the event of termination of employment, an employee must be provided with all of their accrued statutory vacation, accrued through to the end of the statutory notice period
- Statutory vacation time can be forfeited if:
 - 1) The employer and employee agree in writing; and
 - 2) The Director of Employment Standards approves;
 - 3) The employee is terminated
- Vacation pay provided by an employer in excess of statutory vacation pay can be forfeited

Vacation pay issues – Limitation periods

- Employees may bring make complaints to the Director of Employment Standards for unpaid vacation entitlements. Likewise, claims for unpaid vacation may be made in the courts within the context of wrongful dismissal actions.
- Limitation periods
 - Statutory entitlements under the ESA = 2 years
 - General litigation claims under the *Limitations Act* (Ontario) = 2 years
- Two caveats:
 - 1) Recall, vacation must be taken within 10 months of being earned
 - Therefore the “clock” does not (technically) start running until the end of the 10 month period following the year the vacation was earned
 - 2) Discoverability principle:
 - A claim is “discovered” on the earlier of:
 - (i) the day on which the person with the claim first knew that the injury, loss or damage had occurred; or
 - (ii) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known the injury, loss or damage had occurred

Key differences under the Canada Labour Code

- Vacation Time
 - After first year of employment = 2 weeks
 - After five consecutive years of employment = 3 weeks
 - After ten consecutive years of employment = 4 weeks
- Vacation Pay
 - First five consecutive years of employment = 4%
 - After five consecutive years of employment = 6%
 - After ten consecutive years of employment = 8%
- Employees exempt from entitlement to vacation with pay
 - Managers
 - Students fulfilling the requirements of an educational program

Key differences under the Canada Labour Code

- Definition of “wages”
 - Every form of remuneration for work performed
 - Includes:
 - Commissions
 - Bonuses for work performed (such as production bonuses or safety bonuses)
 - Non-monetary remuneration (such as board and lodging)
 - Excludes:
 - Tips
 - Gratuities
- Unilateral scheduling of vacation
 - Employers can unilaterally schedule employees to take their vacation, however employers are required to provide at least 2 weeks of notice before the vacation begins

Key differences under the Canada Labour Code

- Postponing or waiving vacation
 - Employees may postpone or waive their entitlement to vacation time for a specific year if they agree in writing with their employer
 - However, employers remain required to pay the employee vacation pay within 10 months of the end of the vacation entitlement year
- Limitation Periods
 - Claims for vacation pay brought under the *Canada Labour Code* = 6 months from the last date the employer was to pay the vacation pay
 - General litigation claims = limitation periods apply under the provincial legislation of the province where the employee is employed
 - Note: Issues related to discoverability, in accordance with provincial legislation, also apply to claims filed against federally regulated employers

Key considerations and best practices

- Consider creating (or amending) a vacation policy
- Ensure vacation pay is calculated on the basis of all forms of wages
- Ensure that you are tracking statutory and excess vacation time properly
- Know your vacation entitlement year and ensure it is set out in your vacation policy
- Ensure vacation pay is identified as a separate line item on employee pay stubs

Family Status Accommodation

Work in a pandemic and post-pandemic world

Pamela Chan Ebejer, Partner, Toronto

The law on Discrimination and Family Status

- **Federal *Canadian Human Rights Act*:**

- “For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, **family status**, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.” (section 3(1))
- “It is a discriminatory practice for an employer...(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive the individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.” (section 10)

- **Ontario *Human Rights Code*:**

- “Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or disability.” (section 5(1))
- “family status” means the status of being in a parent and child relationship (section 10(1))

Infectious Disease Emergency Leave (IDEL)

- Employees subject to the *Employment Standards Act, 2000* can take IDEL if they cannot work due to childcare or eldercare responsibilities related to COVID-19
 - Examples from the Ministry of Labour guide of when an employee may take IDEL:
 - To care for a child because school or daycare is closed due to COVID-19
 - To care for a child because they did not attend school or daycare for fear of exposure to COVID-19
 - To care for a child whose symptoms did not keep them from school or child care, but the child was kept home as a precautionary measure
- Job-protected leave
- No specified limit to the number of days for an unpaid IDEL
- Eligible for up to 3 days of paid IDEL where:
 - Employee is providing care or support to a specified individual who is under medical investigation, supervision or treatment related to COVID-19
 - Employee is providing care or support to a specified individual who is in quarantine, isolation or under a control measure as a result of a COVID-19 related direction issued by a public health official

Test for Family Status Discrimination

Federal

- “*Johnstone*” test (*Canada (Attorney General) v. Johnstone*, 2014 FCA 110):
 1. The child was under their care and supervision;
 2. The childcare obligation engaged a legal responsibility for the child, as opposed to a personal choice;
 3. The employee had first made reasonable efforts to meet their childcare obligations by exploring reasonable alternatives, and that no alternative solution is reasonably accessible (“self-accommodation” requirement); **and**
 4. The impugned workplace rule interfered with the fulfillment of the childcare obligation in a way that was more than trivial or insubstantial.

Ontario

- HRTO established the following analysis (*Misetich v. Value Village Inc.*, 2016 HRTO 1229):
 - The employee must establish more than a negative impact on a family need
 - Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the employee
 - Once the employee proves discrimination, the onus shifts to the employer to establish that the employee cannot be accommodated to the point of undue hardship

Family Status Accommodation during the pandemic

- *Hydro Ottawa Limited and IBEW, Local 636 (2020-06), Re*, 2021 CarswellOnt 3483
 - At the start of the pandemic, employees alternated working from home and the office
 - Later, the employer implemented a policy requiring employees to work at the office
 - Employees were allowed to use vacation credits or take leave without pay if they could not work at the office
 - Union filed a grievance alleging violation of the collective agreement and Ontario *Human Rights Code*
 - Grievors were female parents of school-aged children whose schools, daycares and/or family members could not assist with childcare due to public health policies
- Arbitrator's decision:
 - Grievors established discrimination on the basis of family status
 - Employer created an economic disadvantage by restricting the scope of its duty to accommodate
 - Request to work from home and earn income was not seeking a "perfect solution"
 - In "normal" times, the employer's offer may have been reasonable

Employee's preference versus need

- *Espinoza v. The Napanee Beaver Limited*, 2021 HRTO 68
 - Employee developed health complications during pregnancy and worked at home occasionally before taking a medical leave of absence and then maternity leave
 - Prior to returning to work, the employee first requested modified schedule working only on Mondays, Tuesdays and Thursdays from 3 to 8 p.m., and did not suggest difficulties with securing childcare
 - Employee's request was denied
 - Employee later raised difficulties with securing full-time childcare and requested accommodation in a second request
 - Employer offered 4 days of additional paid time off for the employee to find full-time childcare
 - Tribunal's decision:
 - Employee's initial request for modified schedule was a preference rather than need
 - Duty to accommodate was triggered once the employee identified the work schedule created a barrier for the return to work because of childcare and the employee requested accommodation

Does past flexibility trigger the Duty to Accommodate?

- *Peternel v. Custom Granite & Marble Ltd.*, 2019 ONSC 5064
 - Prior to maternity leave, employee's start time at work was often flexible
 - After employee's leave, employer asserted that being consistently at work by 8:30 a.m. was vital to employee's position
 - Employee claimed she could never start her workday before 10 a.m. because of childcare obligations
 - Employee alleged the 8:30 a.m. start time was discrimination under the Ontario *Human Rights Code*, and alleged wrongful dismissal
 - Appellate Court's Decision:
 - Employee failed to meet the family status discrimination test
 - 8:30 a.m. start time was a fundamental term of employment despite previous flexibility

Thank you



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