



**DENTONS**

**WEBINAR SERIES**  
LEGAL UPDATES  
FOR CANADIAN EMPLOYERS

# **Sun, strategy, and staying compliant: Navigating summer workplace risks**

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# Moderator:



**Roxana Jangi**  
Partner, Calgary  
+1 403 268 3098  
roxana.jangi@dentons.com

# Speakers:



**Kyle Isherwood**  
Partner, Toronto  
+1 416 863 4739  
kyle.isherwood@dentons.com




**Catherine Coulter**  
Counsel, Ottawa  
+1 613 783 9660  
catherine.coulter@dentons.com



**Emily Kroboth**  
Associate, Toronto  
+1 416 361 2378  
emily.kroboth@dentons.com





# **Behind the curtain: Employment considerations in M&A**



# Mergers and Acquisitions: Employment Considerations

- Overview:
  - Perspectives
    - Buyers vs Sellers
    - Asset vs Share
  - The Process
    - Due Diligence
    - Representations and Warranties
  - Common Issues/Pitfalls



# The Perspectives

## Buyer vs Seller

- Goals and Process Change Dramatically if you are a Buyer vs Seller
- Buyer
  - Trying to uncover all the warts
  - Need to understand the workforce
  - Risks of constructive dismissal
  - Assign as much of the liability as possible to the Seller
- Seller
  - Trying to be forthright, but not overshare
  - Assist the Buyer know what they are taking on
  - Assign as much of the liability as possible to the Buyer
  - Want employment to continue uninterrupted and on the same terms.



# Perspective

## Asset vs Share

- The type of deal has a large impact on employment
- Share purchase = no impact on employees
  - Employment continues with the Company and there is a new owner of the Company
- Asset purchase = technically a termination of employment
- The type of transaction is often determined by tax



# Perspective

## Share Transaction

- Employment is continuous
- In general, you are accepting the workforce as it is
- Existing employment agreements, policies and procedures remain in force unless superseded
- Existing employment liabilities remain with the Company (i.e. the Buyer)
  - Outstanding litigation or complaints
  - Terminated employees
  - WSIB claims
  - MOL investigations/charges
- Assigning liability must be dealt with through the Purchase Agreement



# Perspective

## Asset Purchase

- Purchasing the assets of the business
- No employees automatically continue with the Buyer
- Changing employers is technically a termination
- Can offer employment on new contracts but...
  - Seller will want terms to be identical
  - Buyer will want their own terms
- Liabilities remain with the Seller, but...
  - Employees that are hired by the Buyer are deemed continuous
  - Liabilities for those employees will continue
- Can still assign liability through the purchase agreement



# The Process

## Due Diligence

- The actual “physical” process of reviewing the business.
- Employment is one part of the process
- Involves reviewing employment agreements, employee census policies, procedures, complaints, lawsuits, termination documents, MOL investigations
- Trying to uncover any and all warts of the business.
  - Generally as a Seller you answer the questions asked and you provide all documents requested
- Every due diligence is different, no two Companies are the same.



# The Process

## Representations and Warranties

- Due Diligence informs the representations and warranties in the Purchase Agreement
- Formalized contractual representations about the workplace (and more)
- There are a number of standard terms:
  - Compliance with all employment laws
  - Employee census
  - Union activity
- Disclosure Schedule
- Specific terms to address specific issues
- Seller wants to represent as little as possible, Buyer wants these as broad as possible.



# The Process

## Other Purchase Agreement Terms

- Assigning liability pre-closing
  - Tries to make the Seller liable for all employment issues stemming from pre-closing
  - Occurs at law under an Asset Agreement, but may still be included
- Offers of employment
  - An essential part of an asset purchase. Sets out whether the Buyer will provide employment to the employees
  - Seller wants employment on “identical terms”. Buyer wants to set their own terms.
  - If terms don’t match it can be constructive dismissal and the Seller is liable
  - Any employees terminated as a result of closing will be Seller’s liability in an asset purchase



# Pitfalls

- Seller trying to fix everything in a rush
- New employment agreements in a Share Transaction
- Buyer skipping due diligence
- Both Buyer and Seller not adequately reviewing the R&W
- Forgetting about integration post-closing
- Restrictive Covenants





# **Summer employment challenges: Vacation entitlements and workplace trends**



# Yay!!! Summer Vacation!





# Vacation Pay Obligations

## *A Vacation Refresher*

### Tip #1:

- If you don't currently add at least the statutory 4% or 6% vacation pay to your commission or incentive bonus payments to employees, you probably have a vacation pay liability.



# Fun Facts

- Only 29% of Canadian employees used all of their vacation time in 2022.

*(Maru Public Opinion for ADP Canada Co.)*



# Vacation Pay Obligations

## *A Vacation Refresher*

### Tip #2:

- Carefully track the vacation time your employees take, and the vacation pay which they are paid. Be particularly careful to do this if you grant unlimited paid time off, or if you grant more vacation than is statutorily required.



# Fun Facts

- Globally, Generation Z workers (73%) are most likely to say that they don't get enough vacation days. They are followed by Millennials (66%), Generation X (58%) and then Baby Boomers (43%).

*(Benefits Canada, May 2023)*



# Vacation Carryovers

- Make sure that you make it clear in an employment agreement or vacation policy as to what vacation carries forward if unused, and what vacation is forfeited. Statutory vacation time and vacation pay can never be forfeited.



# Fun Facts

## *The “Time Off Tax”*

- The term “time off tax” means the amount of extra time worked by employees before going on vacation, so that they can get away. In 2023 that average amount was 18 hours.

*(Maru Public Opinion for ADP Canada Co.)*



# Quiet Vacationing

Out of Office Culture Report, Harris Poll, May 2024

OUT OF OFFICE CULTURE



Millennials’ fear of taking time off has made them culprits of out of office workarounds, including mouse moves and playing hooky



VAC06 Which of the following workplace actions have you done? (employed; n=1,170)



# Fun Facts

- The average number of vacation days for Canadian employees with a year of service is 16 days, increasing to 25 days with 20 years of service or more. Three-quarters of Canadian employees receive their entire annual vacation grant immediately upon hire.

*(Mercer's 2024 Canada Leaves Program)*



# Vacationing while working in another country

- Potential issues:
  - Immigration / work visas
  - Loss of out-of-country benefits coverage
  - Creation of a permanent establishment for the employer (corporate tax issues)
  - Securing company confidential information



# Fun Facts

- According to a 2023 survey by Expedia, Canadian employees use 17 out of 19 vacation days per year.

*(Benefits Canada, May 2023)*



# Vacation during leaves of absence

- Vacation time continues to accrue during leaves.
- Vacation pay is a % of wages earned from the employer. If the employee is on leave and just collecting Employment Insurance benefits from Service Canada or disability benefits from an insurer, then 4% or 6% of \$0.00 equals \$0.00 in vacation pay.



HAPPY  
SUMMER  
VACATION!





# **Hot topic: Heat-related OHS obligations for outdoor workers**



# Heat Stress Across the Provinces

- Provincial health & safety laws (including heat stress)
- Most stringent: British Columbia, Quebec and Yukon Territory
- Least stringent: Prince Edward Island, Manitoba and Nova Scotia
- Most provinces require compliance with the ACGIH's *2019 Threshold Limit Values for Chemical Substances and Physical Agents & Biological Exposure Indices*
- Many of the provinces have also published guidance documents with respect to heat stress and thermal temperatures



# British Columbia

- Sections 7.27 to 7.32 of Part 7 of the Occupational Health and Safety Regulation, BC Reg 296/97, as well as their accompanying Guidelines.
- Heat stress regulations apply to a workplace if:
  - a) a worker is or may be exposed to thermal conditions which could cause heat stress;
  - b) the thermal conditions could result in a worker's core body temperature exceeding 38°C (100°F); or
  - c) the thermal conditions are in excess of the levels listed in the screening criteria for heat stress exposure in the heat stress and strain section of the ACGIH Standard for unacclimatized workers.



# British Columbia

## Examples:

- Pulp mills (around the recovery boilers, paper machines, and lime kilns);
- Sawmills (around the kilns or burners);
- Smelters;
- Cement kilns; and
- Outdoor work sites during hot weather (e.g., road construction and asphalt paving, roofing, tree planting).



# British Columbia

- OHS Regulation mandates the use of specific personal protective equipment and requires the implementation of a heat stress assessment control plan, acceptable measures, methods, and controls, as well as the provision of water, removal, and treatment.



# Alberta

- In Alberta, there are no regulations that specifically address heat stress.
- However, Alberta employers must ensure the health and safety of workers at their work sites, pursuant to section 3(1) of the Alberta *Occupational Health and Safety Act*.
- Further, section of the Alberta Occupational Health and Safety Code, Alta Reg 191/2021 provides:
  - **Hazard assessment**  
7(1) An employer must assess a work site and identify existing and potential hazards before work begins at the work site or prior to the construction of a new work site.



# Alberta

- Alberta instead has guidance documents available
- What employers can do:
  - use a work-rest schedule
  - change the work location to a cooler shaded area
  - create a cooling station where workers can rest
  - allow workers to adapt to the temperature
  - schedule more physically demanding jobs for cooler times of the day
  - providing plenty of cool drinking water
  - do a hazard assessment, put controls in place for protection and educate workers on hazards of working in the heat



# Ontario

- No official act regulation – yet
- Bill 222, Heat Stress Act, 2024
  - Preamble: increasing worker protections due to climate change



# Ontario

- **Worker Heat Protection Standard**

- **42.1** (1) The Minister shall develop and implement a Worker Heat Protection Standard that includes the following:
  - 1. Requirements to eliminate hazardous levels of heat stress through engineering controls, such as isolating or shielding employees from sources of heat, exhaust ventilation, insulation of hot surfaces or climate-control technologies, as well as technology based standards that encourage the development of such control.
  - 2. Requirements to limit exposure to hazardous levels of heat stress by using the hierarchy of controls, which may include the adjustment of work procedures, work schedules or other work practices.
  - 3. Requirements to provide, at the employer's expense, breaks and personal protective equipment such as water-cooled garments, air-cooled garments, heat-reflective clothing and cooling vests.
  - 4. Requirements for every employer to develop and implement, in consultation with and considering any recommendation of any health and safety representative or committee, a Heat Stress and Protection Policy and Program and to review the policy and program as often as necessary and no less than once every 12 months.
  - 5. Requirements for every employer to conduct a heat stress assessment as often as necessary and no less often than the prescribed frequency, if any, to determine if a worker is or may be exposed to thermal conditions likely to cause heat stress.
  - 6. Requirements for every employer to provide the health and safety representative or committee with the results of every heat stress assessment.
  - 7. Requirements for every employer to provide workers with access to cool drinking water or an adequate alternative hydrating fluid close to every work area.



# Ontario

For now:

R.R.O. 1990, Reg. 851: INDUSTRIAL ESTABLISHMENTS, under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, regulates workplace temperature in Ontario.

Section 29 provides:

- **129.** (1) Subject to subsection (2), an enclosed workplace shall be at a temperature,
  - (a) suitable for the type of work performed; and
  - (b) not less than 18° Celsius. R.R.O. 1990, Reg. 851, s. 129 (1).
- In addition to the above, pursuant the Ontario *Occupational Health and Safety Act*, an employer has a duty to take every reasonable precaution in the circumstances for the protection of a worker.



# Ontario

- Guidance document – “Managing heat stress at work”
  - Design your workplace to reduce heat stress
    - Insulation, barriers, air conditioning
  - Plan ahead to reduce heat stress
    - Rest breaks, scheduling, cool drinking water, training
  - Help workers adjust to hot environments
    - Gradually increase exposure to activity level/hot working conditions
  - Encourage workers to wear suitable protective clothing
    - Light, breathable, reflective
  - Creating a heat stress/hot weather plan



# Québec

- Pursuant to its general obligation to protect worker's health and safety and to specific obligations set forth in the *Regulation respecting occupational health and safety*, employers shall take specific steps to avoid heat stress in generally hot workplaces and in all workplaces during hot days.
- Applicable to any establishment with 50+ workers, where workers are exposed to heat stress (at certain thresholds)
- Must ensure workers undergo medical supervision and must provide them with water at a temperature of between 10 °C and 15 °C, and one shower per 15 workers
- Must add insulation or ventilation to reduce heat stress, or implement a work/rest schedule



# Québec

- CNESST heat stress guidance document:
  - General preventive measures for employers
    - Plan work for hot days (e.g., supply of water and necessary equipment)
    - Inform workers and supervisors of the dangers of heat stroke (risks, signs, symptoms), first aid and the means of protection available to them
    - Provide workers with sufficient fresh water and ensure that they have access to it and drink it (at least one glass of water every 20 minutes)
    - Allow job rotation or modify work schedules
    - Provide work and rest areas in the shade, or in a cool or air-conditioned area



# Thank you



**Roxana Jangi**  
Partner, Calgary  
+1 403 268 3098  
roxana.jangi@dentons.com



**Kyle Isherwood**  
Partner, Toronto  
+1 416 863 4739  
kyle.isherwood@dentons.com



**Catherine Coulter**  
Counsel, Ottawa  
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