

# Employment and Labour Law trends to watch for in 2019

January 17, 2019

# Legislative updates

# Legislative update

Ontario

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# How do I keep all of this straight???

- Until last autumn, Bill 148 was the “legislation du jour” under the old Liberal government (the *Fair Workplaces, Better Jobs Act, 2017*).
- In late 2018, the new Conservative government enacted Bill 47 (the *Making Ontario Open for Business Act, 2018*).
- Subsequently, the Conservative government also enacted Bill 57 (the *Restoring Trust, Transparency and Accountability Act, 2018*) and will be enacting Bill 66 (the *Restoring Ontario’s Competitiveness Act, 2018*).
- Let’s talk about what’s changed, what’s changing, and what’s staying the same.

# What has changed?

## Changes under Bill 47:

- Minimum wage remains at \$14/hour. It will be re-indexed in October 2020.
- Personal emergency leave no longer exists. In its place we now have: (i) 3 days of personal illness leave; (ii) 3 days of family responsibility leave; and (iii) 2 days of bereavement leave. All are unpaid.
- The ban for requesting a doctor's note is removed.
- Equal pay for equal work has been removed on the basis of employment status, but the requirement for equal pay on the basis of sex still remains.
- The new scheduling and on-call provisions that came into force under Bill 148 have been revoked.
- For employees who regularly work more than 3 hours per day but attend work and end up working less than 3 hours, the employer will be required to pay wages equivalent to 3 hours of pay.

# What has changed? (con't.)

- The reverse onus on employers regarding independent contractors has been repealed.
- Under the *Labour Relations Act, 1995* (“LRA”), we also have the following changes:
  - The ability for trade unions to apply, when there is no certified bargaining agent for all employees, for an order requiring an employer to provide the trade union with a list of all employees, is revoked.
  - The Ontario Labour Relations Board is no longer required to certify a trade union for certain employer contraventions of the LRA.
  - The ability of the Ontario Labour Relations Board to review the structure of bargaining units and grant certain orders in certain circumstances, is repealed.
  - The expansion of automatic card-based certification for industries outside of construction, is revoked.
  - The new first contract arbitration provisions are reversed.
  - Collective agreements will be publically available on the Ontario Government website.
  - The doubling of fines for convictions under the LRA are reversed.

# What has changed? (*con't.*)

## Changes Under Bill 57:

- The planned January 1, 2019 coming into force of the *Pay Transparency Act, 2018* has been postponed to a date to be determined by the government.
- As a reminder, the *Pay Transparency Act* does the following: (i) bans employers from seeking information about previous compensation from a job applicant; (ii) requires employers to include information about the expected compensation or range of expected compensation on publicly advertised job postings; (iii) requires prescribed employers to prepare a pay transparency report, submit it to the Ministry of Labour and post it in the workplace; and (iv) prohibits reprisals.



# What is changing?

- Bill 66 is an Omnibus Bill which has passed First Reading but is not yet in force. Assuming that it is passed into law in 2019, it will amend the *Employment Standards Act, 2000* (“ESA”) as follows:
  - Employers will no longer require approval from the Director of Employment Standards in order to permit hours of work in excess of 48 hours per week. As long as the employee agrees in writing to work more hours, that will be permitted.
  - The ESA Poster will no longer need to be posted in the workplace.
  - Employers will no longer need to obtain approval from the Director of Employment Standards to make averaging agreements for the purpose of determining employee entitlements to overtime pay. As long as the employee agrees in writing to an averaging agreement over a period of up to 4 weeks at a time, that will be permitted.
- In addition, Bill 66 will amend the LRA to state that public bodies such as municipalities, school boards, hospitals, colleges and universities will be deemed “non-construction employers”. This will help to prevent them from becoming bound to collective agreements for the construction industry when they’re not actually in the construction business.

# What has stayed the same?

- Vacation will still increase from 2 to 3 weeks for employees with 5 or more years of service.
- The new leaves of absence remain in force (Child Death Leave; Domestic or Sexual Violence Leave).

# Thank you

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# Legislative update

Alberta

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# Hours of work averaging agreement - Transition

- One year since the significant amendments to the *Alberta Employment Standards Code* came into force.
- Some employers being caught out by the transition requirements under section 23.1 – Hours of Work Averaging Agreements
- As part of the transition to the amended Code, employers were allowed to keep existing compressed work arrangement for up to one year following the coming into force of s. 23.1 (January 1, 2018)
- All pre-existing compressed work week arrangement expired January 1, 2019 and should be replaced immediately

# Hours of work averaging agreement - Requirements

## Hours of Work Averaging Agreements:

- Can be individual or group (majority support of affected employees required)
- Can be initiated by the employee or the employer
- Must be in writing
- Employees must be provided with a copy of the Agreement and Employer must post a copy on the employer's website and in the workplace where affected employees can see it

# Hours of work averaging agreement - Requirements

- Start and end date – term cannot exceed 2 year
- Averaging cycle cannot exceed 12 weeks
- Must set out work schedule which identifies all the work days and the number of hours to be worked on each of those work days in the averaging period (only one work schedule per agreement)

# Hours of work averaging agreement - Requirements

- Scheduled daily and weekly hours of work cannot exceed:
  - 12 hours per day, and
  - 44 hours per week or an average of 44 hours per week
- Must include details of how overtime pay and time off with pay will be calculated – the greater of all hours worked in excess of:
  - 8 hours a day (if scheduled for less than 8 hours) or daily scheduled hours (if 8 or more hours were scheduled)
  - 44 hours a week (in a 1-week averaging period) or an average of 44 hours a week (in a multi-week averaging period)



# Hours of work averaging agreement - Variations

## Variations to Averaging Agreement Schedules:

- Temporary change to work schedule require 2 weeks' notice.
- If a change is made with less than 2 weeks' notice, any hours worked in excess of 8 hours in a work day that were not in the previous schedule are calculated as overtime hours.
- Exceptions exist for accidents, urgent work and unforeseen or unpreventable circumstance
- If an employee makes up a shift on an unscheduled work day employee is paid in accordance with the originally scheduled shift.

# Thank you

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# Legislative Update

Quebec

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# THE NEW BILL 176 ERA

- Bill n. 176, *An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance*
  - Royal Assent on June 12, 2018
  - Many of the changes came into effect upon Royal Assent
  - Certain modifications came into force as of January 1, 2019
  - Aims at helping employees find a better family-work balance

# FAMILY-WORK CONCILIATION MEASURES

## Family or parental leave of absences

- Expanded the right of an employee to take a leave of absence for family or parental reasons by adding the term “relative”
  - Relative now includes: the child, father, mother, brother, sister and grandparents of the employee or of his/her spouse, including the spouses of the aforementioned people, their children and the spouses of the children
  - The Act now recognizes that an employee can act as a “caregiver” for one of the people mentioned above
- An employee with 3 months of uninterrupted service is entitled to have the first 2 days of family or parental leave to be paid

# FAMILY-WORK CONCILIATION MEASURES

## Prolonging the period of absence allowed in case of serious illness or grave accident

- Extended the authorized period of absence in the event of serious illness or grave accident from 12 weeks to 16 weeks over the course of a 12-month period. In the case of a minor child, the period of absence allowed is 36 weeks
- An employee may also be absent for a period of 27 weeks over the course of 12 months when his presence is required for a relative, with the exception of his/her child, or a person to whom s/he is acting as caregiver if the illness is potentially mortal

# FAMILY-WORK CONCILIATION MEASURES

## Staggering work hours

- Employers no longer need authorization from the CNESST to stagger the working hours on a basis other than a weekly basis if the employee agrees and the following conditions are satisfied:
  - the agreement needs to be in writing. No need to file the agreement before the CNESST
  - the agreement must be in writing and for a maximum duration of 4 weeks
  - the work week may not exceed the normal work week by more than 10 hours
  - the agreement can be ended by either the employer or the employee upon providing 2 weeks notice

# FAMILY-WORK CONCILIATION MEASURES

## Refusal to work

- An employee may now refuse to work more than 2 hours beyond his/her normal work schedule
- Employee may refuse to work if s/he was not informed at least 5 days in advance that s/he would be required to work, subject to certain exceptions (e.g. nature of his/her duties requires to remain available, farm worker, etc.)



# PAID LEAVE

## Vacation/vacation pay

- Effective January 1st, 2019, an employee with 3 years uninterrupted service is entitled to a minimum of 3 consecutive week's statutory vacation
- The vacation pay is now payable in one lump sum prior to the leave or in the manner applicable for the regular payment of wages
- Where warranted by the seasonal or otherwise intermittent activities of an employer, the vacation pay may be added to an employee's wages and be paid in the same manner

# PAID LEAVE

## Statutory general holidays and non-working days with pay

- Employers must pay the statutory holiday indemnity or grant a compensatory holiday to the employee if such a holiday does not coincide with the employee's regular work schedule

# UNFORESEEN LEAVE OF ABSENCES

## Absences owing to sickness, organ/tissue donation for transplant, accident, domestic/sexual violence, or a criminal offence

- Leaves of absence for domestic violence and sexual violence have been added
- An employee who is victim of either domestic or sexual violence will be entitled to 26 weeks of absence in a 12-month period
- Eligibility upon hiring
- The first 2 days of absence will be paid if the employee is credited with 3 months of uninterrupted service, provided an employee may not cumulate the 2 paid days granted for family/parental leave with the 2 paid days granted for domestic/sexual violence

# UNFORESEEN LEAVE OF ABSENCES

## Leave owing to the death of an immediate family member

- Employees are now entitled to 2 days of **paid** leave and 3 days of **unpaid** leave following the death of a member of his/her **immediate** family (spouse, child, spouse's child, father, mother, brother, sister)

# UNFORESEEN LEAVE OF ABSENCES

## Paid absence for birth/adoption of a child or termination of pregnancy in or after the 20th week

- An employee is now entitled to 2 days of **paid** leave and 3 days of **unpaid** leave following the birth/adoption of a child or the termination of pregnancy in or after the 20th week, without the requirement of having 60 days of uninterrupted service

# UNFORESEEN LEAVE OF ABSENCES

## Absence in the event of a missing child, death by suicide of a spouse, a child of full age, or mother/father

- The authorized period of absence has been extended from 52 weeks to 104 weeks in the event of a child's disappearance, or death by suicide of one of the persons enumerated above
- New application in the event of the suicide of an employee's parents

# DIFFERENCES IN TREATMENT

## End of Orphan clauses

- Prohibition of different treatment based on the date of hiring regarding pension plans/fringe benefits that affect employees who do the same work in the same establishment
- Such differential treatment clauses that existed prior to the date of assent of Bill 176 (June 12th, 2018), remain valid. In such a case, no contestation before the Administrative Labour Tribunal (TAT)

# DIFFERENCES IN TREATMENT

## Remuneration

- Effective January 1st, 2019, an employer may not pay a lower wage or reduce the length/indemnity relating to vacation between employees who have the same duties within the same establishment solely based on the employee's status (e.g. part-time/full-time)
- The exception that used to exist for employees who earned more than 2 times the minimum wage is struck



# PSYCHOLOGICAL AND SEXUAL HARASSMENT

## Definition and policy

- Definition of psychological harassment broadened to include sexual gestures
- Obligation to adopt a psychological harassment prevention and complaint processing policy that specifically includes a section on behavior that manifests itself in the form of verbal comments, actions or gestures of a sexual nature
- Extension of the delay to file a psychological harassment complaint before the CNESST from 90 days to up to 2 years after the last occurrence of harassment

# LIABILITY OF Directors/Officers

## Presumption

- In case of violation of the *Act*, directors/officers are presumed to have committed the offence, unless they can establish evidence of due diligence

# Thank you



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# Legislative Update

British Columbia

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# Employment Trends 2019 – British Columbia

## Trends to Watch

- Employer Health Tax
- *Labour Relations Code* changes
- Return of the Human Rights Commission
- Bullying and Harassment

# Employment Trends 2019 – British Columbia

## Employer Health Tax

- No more Medical Services Plan (MSP) premiums as of January 1, 2020
  - Reduced as of January 1, 2018
- New Employer Health Tax (EHT) in effect January 1, 2019
  - Payroll tax on employers
  - Separate, distinct and in addition to MSP premiums
- Paying employee MSP premiums is an optional benefit; EHT is mandatory
- What do you provide your employees?

# Employment Trends 2019 – British Columbia

## Employer Health Tax

- EHT rates are based on payroll
  - **Less than \$500,000** - 0%
  - **\$500,000.01 to \$1,500,000** - 2.925% (only on payroll over \$500,000)
  - **Greater than \$1,500,000** - 1.95% (all payroll)
- Associated employers' payroll is combined
  - Share the \$500,000 exemption
  - No exemption for any employer if associated group's payroll >\$1.5 million
- Different rules for charitable and non-profit employers
- Prorated rate thresholds for part-year employers

# Employment Trends 2019 – British Columbia

## *Labour Relations Code Changes*

- In 2018, the governmental *Labour Relations Code* Review Panel released a report with recommendations for Code amendments
- No changes yet
  - Recommendations form the basis of likely changes to the Code
- Drivers for the review
  - Changes to BC's **economy** – more enterprises and employee movement
  - **Demographic** changes – a more diverse, older and more educated workforce
  - Growth of **non-standard work** – increased volatility, skill gap & part-time work
  - **Globalization** – “fissuring” of business functions
  - **Technology** changes – changing skills and the gig economy
  - Growth of **the service sector** – shift away from resource extraction & manufacturing
  - Decline in **union density** – fewer people are joining unions



# Employment Trends 2019 – British Columbia

## *Labour Relations Code Changes – Highlights*

- Restricted employer communication rights
  - Currently, the Code expressly provides free speech rights to employers (and everyone), so long as they don't act in a coercive or intimidating manner
  - Revised Code would limit the scope of permissible speech to reasonably held statements of fact or opinion
  - This is a reversion to the 2002 Code language
- Extended union drives
  - Increase expiration of membership cards from 90 days to 6 months
- Faster certification votes
  - Decrease window for certification/de-certification votes following an application from 10 days to 5 days

# Employment Trends 2019 – British Columbia

## *Labour Relations Code Changes – Highlights*

- Longer freeze periods
  - Increase the period during which employment terms and conditions cannot be changed after certification from 4 months to 12 months
  - Decertification prohibited for 12 months (up from 10 months)
- Enhanced employee information disclosure requirements
  - Labour Relations Board (LRB) could order employer to provide a list of employees and contact information upon certification
- Non-vote certifications
  - Empower the LRB to order certification without a vote where the employer has engaged in unfair labour practices
  - Lower evidentiary threshold to show the union otherwise would have sufficient support

# Employment Trends 2019 – British Columbia

## *Labour Relations Code Changes – Highlights*

- Narrower definition of picketing
  - Exclude leafleting that dos not “unduly impede” access
- Expanded successorship to contractors
  - Apply the Code’s successorship provisions when contracts are re-tendered in certain industries
  - Building cleaning, security, bus transport and health sector
- Increased fines
  - Maximums of \$5,000 for individuals and \$50,000 for companies
  - Up from \$1,000 and \$10,000, respectively

# Employment Trends 2019 – British Columbia

## Return of the Human Rights Commission

- BC is currently the only province without a human rights commission
- The Human Rights Commissioner would be an independent body responsible for proactively examining human rights issues and educating the public
  - Developing resources
  - Publishing reports
  - Examining policies, programs and legislation from a human rights perspective
  - Researching
  - Intervening in complaints
- The Commission is separate from the BC Human Rights Tribunal
- Time limit for complaints under the *Human Rights Code* **extended from 6 months to one year**

# Employment Trends 2019 – British Columbia

## Bullying and Harassment

- Increased awareness of bullying and harassment in the workplace
- More complaints, more investigations, more robust policies
- As in other jurisdictions, harassment is no longer only a human rights issue, it is a workplace safety issue and we are seeing more focus on this area
- Will the threshold for “bullying” and “harassment” move in response to changing views?
- Be alive to the difference between your minimum legal obligations and your desired workplace culture

# Thank you

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# Legislative Update

## Federal Jurisdiction

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# OVERVIEW

- *Canada Labour Code*
  - Leaves of Absence
  - Notice of Termination
  - Hours of Work
  - Equal Pay
  - Vacation
- Federal Pay Equity Regime



# Canada Labour Code

## LEAVES OF ABSENCE

Leave	Details	Effective Date
Personal Leave	5 days of personal leave, with the first 3 days being paid, for: i) Treating personal illness or injury; ii) Tending to health or care of family member; iii) Tending to education of family member under 18; iv) Addressing an urgent matter concerning themselves or a family member; v) Attending their citizenship ceremony; or, vi) Any other prescribed reason.	TBD
Medical Leave	Up to 17 weeks' unpaid for personal illness, injury, organ or tissue donation, or medical appointments during work hours. ER may require medical note for absence of 3 days or longer.	Sept 1, 2019
Family Violence	Up to 5 days' paid per year	TBD
Parental Leave	Remove minimum employment period for eligibility	Sept 1, 2019

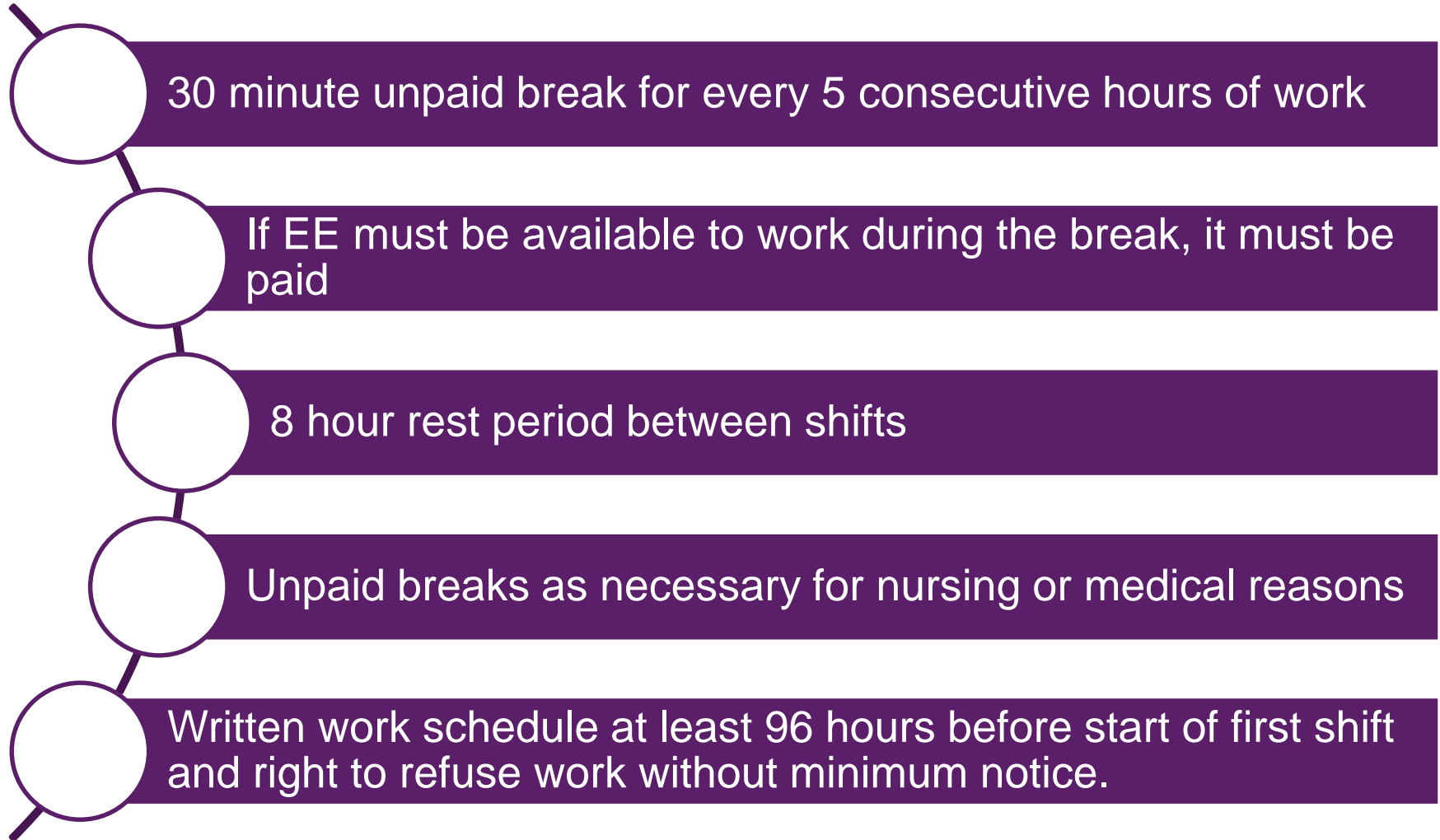
# Canada Labour Code

## Notice of Termination

Length of Service	Notice Period Entitlement
3 months of continuous service	2 weeks' notice
3 years	3 weeks' notice
4 years	4 weeks' notice
5 years	5 weeks' notice
6 years	6 weeks' notice
7 years	7 weeks' notice
8 years	8 weeks' notice

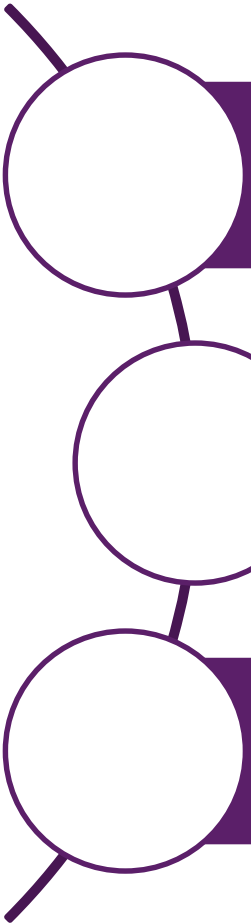
# Canada Labour Code

## Hours of Work



# Canada Labour Code

## Equal Pay for Equal Work



Employers cannot pay employees different rates of pay based solely on employment status (e.g. – full time vs part time).

Equal pay is required where employees work in the same establishment under similar working conditions and perform substantially the same kind of work, requiring substantially the same skill, effort and responsibility.

Differences based on seniority, merit systems, quantity or quality of production, or any other prescribed criterion are exempt.

# Canada Labour Code

Vacation	
Length of Service	Vacation Entitlement
1 year	2 weeks' vacation & 4% of wages
5 years	3 weeks' vacation & 6% of wages
10 years	4 weeks' vacation & 8% of wages

- Minimum Age
- Continuity of Employment
- Burden of Proof

# Federal Pay Equity

- Come into force at a date to be named
- Pay Equity Commissioner within the Canadian Human Rights Commission
  - Responsible for both education and enforcement
  - Audits, investigations, orders and administrative remedies

# Thank you

The Dentons logo, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

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# Employment and Labour Law Trends to Watch for in 2019



# USA Business Immigration Border Crossing Cannabis

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# Business Visas Non-Immigrant – Alphabet Soup

The chart below contains many different purposes of temporary travel and the related nonimmigrant visa categories available.

Visa Category	Purpose of Travel
A-1	Diplomatic employees
A-2	Foreign government officials and immediate family
A-3	Personnel employees of A-1
B-1	Visitors for business
B-2	Visitors for pleasure
C-1	Transit visas (pass-through at an airport or seaport)
D-1	Crewmembers on board a vessel who land temporarily in the U.S.
D-2	Crewmembers on a fishing vessel with home port in the U.S. who intend to land temporarily in Guam

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
E-1	Treaty Traders
E-2	Treaty Investors
E-3	Australian professionals
F-1	Students in colleges, universities, seminaries, conservatories, academic high schools and language training programs
F-2	Immediate family members of F-1
G-1	Designated principal resident representatives of a foreign government that is a members of an international organization
G-2	Other accredited representative of such foreign governments (G-2)
G-3	Representatives of foreign governments who would qualify for G-1 and G-2 status except for the fact that their governments are not members of international organization entitled to privileges and immunities under the International Organizations Immunities Act

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
G-4	Officers and employees of such international organizations
G-5	Attendants, servants and personal employees of any such representatives
H-1B	Aliens in specialty occupations or fashion models of distinguished merit; certain department of defense employees
H-1B1	Free Trade professionals from Chile or Singapore
H-1C	Nurses
H-2A	Agricultural workers
H-2B	Temporary or seasonal workers
H-3	Trainees
H-4	Immediate family members of aliens on an H-1, H-2 or H-3

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
I	Representatives of international media
J-1	Exchange visitors (e.g. educational exchange students, au pairs, graduate medical trainees, students, professors and researchers, short-term scholars, camp counselors)
J-2	Immediate family members of alien on a J-1
K-1	Fiancé and fiancées of U.S. citizens
K-2	Children of fiancé and fiancées of U.S. citizens
K-3	Spouses of U.S. citizens
K-4	Children of spouses of U.S. citizens
L-1A	Intracompany transferees, including executives or managers
L-1B	Intracompany transferees with specialized knowledge
L-2	Immediate family members of aliens on L-1

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
M-1	Language and vocational students
M-2	Immediate family members of aliens on M-1
N-8	Parents of children who have been accorded special immigrant status
N-9	Children of parents who have been accorded special immigrant status or are on an N-8
NATO-1 through NATO-7	Aliens coming to the U.S. under provisions of the NATO treaty
O-1A	Individuals with an extraordinary ability in the sciences, education, business, or athletics
O-1B	Individuals with an extraordinary ability in the arts or extraordinary achievement in motion picture or television industry

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
O-2	Individuals who will accompany an O-1, artist or athlete, to assist in a specific event or performance
O-3	Immediate family of aliens on an O-1 or O-2
P-1	Athletes & entertainment groups (e.g. orchestras) and support personnel
P-2	Entertainers, individually or as a group, on an exchange program
P-3	Artists and entertainers, individually or as a group, who perform or teach under a program that is culturally unique
P-4	Immediate family of aliens on a P-1, P-2 and P-3
Q	Participants in international cultural exchange programs (e.g. Smithsonian Folklife Festival)
R-1	Ministers and other religious workers
R-2	Immediate family of aliens on an R-1

# Business Visas Non-Immigrant – Alphabet Soup (cont'd)

Visa Category	Purpose of Travel
S	Certain individuals supplying critical information relating to criminal organization or terrorism
TN	Individuals from Canada or Mexico who are permitted to enter under the North American Free Trade Agreement (NAFTA)
TD	Immediate family of aliens on a TN
T	Victims of trafficking in persons
U	Victims of crime who have suffered abuse and are cooperating with the U.S. government in investigation or prosecution of the crime
V	Spouses and minor children of lawful permanent residents
WB	Visa Waiver entrants for business
WT	Visa Waiver entrants for pleasure



# Travelers to the United States

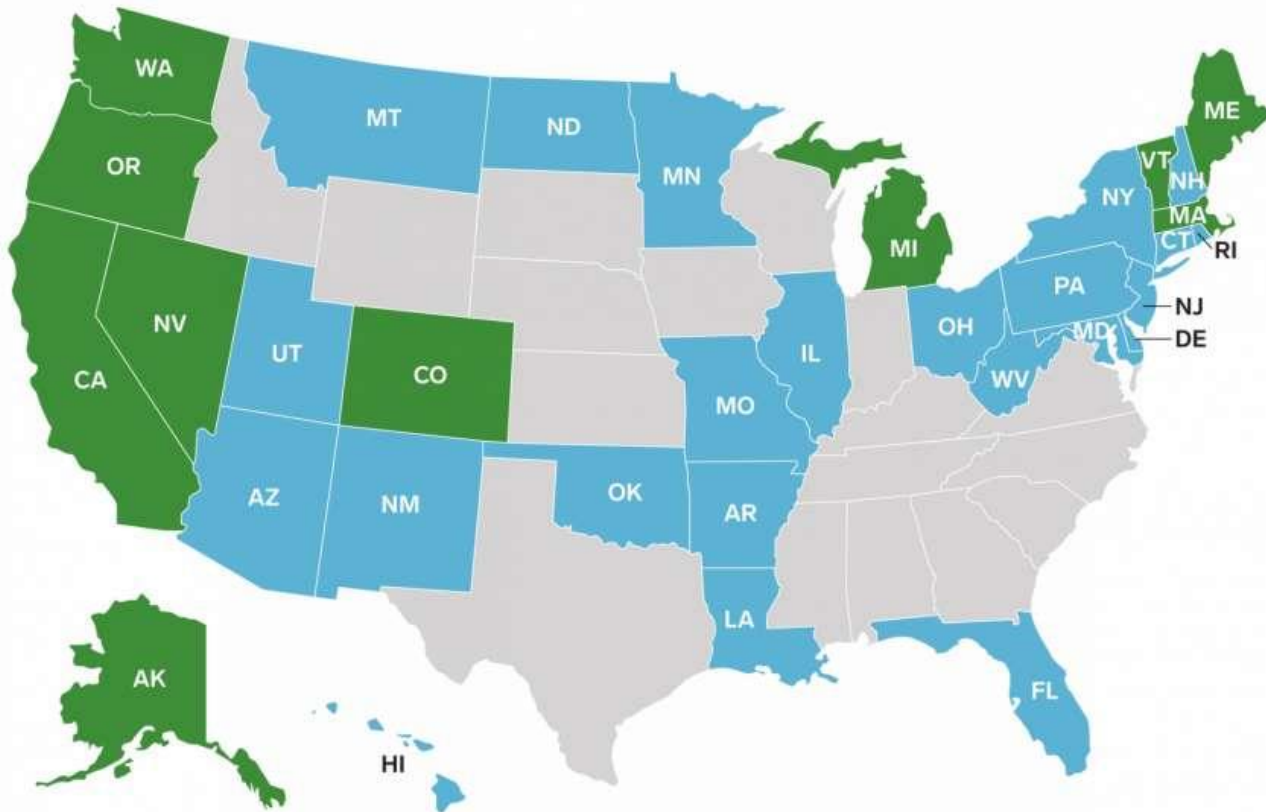
- Be aware. Be prepared.
  - Legal Federal Immigration Laws
  - Case Evaluation
  - Purpose of Trip
  - Status / Visa
  - Documentation
  - Period of Stay
  - Violations
- Under Federal U.S Law it is illegal to cross U.S border with cannabis in any form, even if travelling to a U.S. state that has legalized possession of cannabis.
  - Entry denial, fines, jail time, lifetime bans, trafficking.
- Misrepresentation can result in same action.

- U.S. Customs and Border Protection(CBP) enforces the laws of the United States.
- U.S. laws have not changed following Canada's legalization of marijuana.
- U.S. Federal Law governs U.S Immigration and supersedes state laws.
- Immigration and Nationality Act governs admissibility of travelers into the United States.
- Medical and recreational marijuana legal in some U.S. States.
- Sale, possession, production and distribution of marijuana or the facilitation remain illegal under U.S. Federal Law.
- Determinations about U.S admissibility
  - Regulatory or criminal enforcement made by CBP officers based on facts and circumstances known to officer at the time.
  - Questioning, Possessions, Electronics, On-line searches.

## States where marijuana is legal

■ Legalized recreational and medical marijuana

■ Legalized medical marijuana



Insider Inc.

- United States Controlled Substances Act of 1970. Marijuana classified as Schedule I drug.
- Cannabis Act, Bill C-45, introduced in Canada's House of Commons on April 13, 2017.
- October 17, 2018 Cannabis Act came into force.  
<https://www.canada.ca/en/services/health/campaigns/cannabis/canadians.html>.
- Marijuana use, cultivation, products, involvement, participation impacts admissibility into the United States and other countries.
- As of January 2019 U.S. marijuana for medicinal purposes legal in 33 U.S. states and District of Columbia. Recreational use legal in Ten U.S. states.

- U.S. Customs and Border Protection (CBP) enforcement determine admissibility of individuals
  - Advising foreign nationals in advance of travel is vital
  - No right to counsel at ports of entry
  - Increased risks associated with travel to the United States

# Criminal Grounds of Inadmissibility

- INA § 212(a)(2)(A)(i)(II) renders inadmissible:
- *any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of ... a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) ...*
- Requires a conviction or admission as to the commission of a crime relating to a controlled substance.
- Foreign national who is convicted in the United States for a marijuana-related offense, even if legal in the state where the person was charged, is inadmissible under INA § 212(a)(2)(A)(i)(II).

## ***Criminal Grounds of Inadmissibility (cont'd)***

- Foreign national who is convicted of a marijuana-related offense outside the U.S. is inadmissible, even if using, possessing or being under the influence of marijuana is subsequently legalized.
- Waiver under INA § 212(d)(3) (for nonimmigrants) or INA § 212(h) (for a single offense of simple possession of 30 grams or less of marijuana), or post-conviction relief, such as vacatur of judgment.
- Questioning and records of sworn statements by CBP has led to findings of inadmissibility.
- CBP officers affirmatively inquire about use of controlled substances, with relevant statutory sections and document steps of verifying admission to essential elements of a crime. Once finding made, difficult to overcome, no appeal of an inadmissibility determination.

## ***Criminal Grounds of Inadmissibility (cont'd)***

- *Matter of K*, 7 I&N Dec 594, BIA 1957 (establishing a 3-part test for the acceptance of an admission: (1) the admitted conduct must constitute the essential elements of a crime; (2) the applicant must have been provided with a definition and the essential elements of the offense prior to his admission; and (3) the admission must be voluntary).  
*Pazcoguin v. Radcliffe*, 292 F. 3d 1209 (9th Cir, 2002).
- Peter Zimonjic and Julie Van Dusen, “Have you ever smoked weed? Answer this question and you could be banned from the U.S.” (Sept. 17, 2017), CBS News.  
<http://www.cbc.ca/news/politics/pot-border-banned-waiver-1.3752278>.



# Trafficking-Related Ground of Inadmissibility

- INA § 212(a)(2)(C)(i) renders inadmissible:
  - *Any alien who the consular officer or the Attorney General knows or has reason to believe... is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so....*
- An applicant for admission with a marijuana-related criminal history or who confirms having had a relationship or contact with a business engaged in the marijuana industry, even in a nation or U.S. state where doing so is legal. This ground applies to visiting marijuana dispensaries or volunteering at marijuana farms.

## ***Trafficking-Related Ground of Inadmissibility*** **(cont'd)**

- Inadmissibility determination based on a “reason to believe” applicant is or has been a trafficker of controlled substances.
- Investors, officers, and employees or volunteers at marijuana-related businesses are at risk to an inadmissibility determination on this ground.
- Working in the legal marijuana industry in Canada may not necessarily result in an inadmissibility determination if:
  - *A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. However, if a traveler is found to be coming to the U.S. for [a] reason related to the marijuana industry, they may be deemed inadmissible.*

# *Medical-Related Grounds of Inadmissibility*

- CBP may deny entry to a foreign national who admits to using marijuana.
- INA § 212(a)(1)(A)(iii) renders inadmissible any foreign national who is found to have or previously have had a physical or mental disorder and associated harmful behavior that may pose a threat to the property, safety, or welfare of the alien or others. INA § 212(a)(1)(A)(iv) deems drug abusers and addicts inadmissible.
- Panel physicians assess admissibility on health-related grounds and are bound by the U.S. Centers for Disease Control and Prevention (CDC) Technical Instructions in carrying out immigration medical exams.
- CDC Technical Instructions, a finding of inadmissibility under INA § 212(a)(1)(A)(iii) where panel physician finds applicant has a substance use disorder, defined as, “a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems” plus associated harmful behavior.

## *Medical-Related Grounds of Inadmissibility (cont'd)*

- The legality of the substance is not relevant. Ground of inadmissibility is used to prohibit the entry of individuals who abuse or are addicted to alcohol and/or who have driving-related alcohol offenses. Similar finding apply to someone who legally used marijuana and subsequently engaged in harmful behavior, such as driving under the influence.
- CDC Technical Instructions, INA § 212(a)(1)(A)(iv) only applies to controlled substances. Alcoholism cannot lead to a finding of inadmissibility under this ground, as a controlled substance, marijuana abuse or addiction could trigger such a finding, even absent associated harmful behavior.
- The question then becomes what type of marijuana use constitutes “abuse” or “addiction.” “Abuse” is a lower threshold that potentially encompasses even those who have used marijuana only a few times. If a CBP officer or a panel physician asks an applicant whether he or she has ever used marijuana and the applicant answers in the affirmative, this ground of inadmissibility may be triggered.

## ***Medical-Related Grounds of Inadmissibility (cont'd)***

- Maia Szalavitz, “Is Marijuana Addictive? It Depends How You Define Addiction” (Oct. 19, 2010)  
<http://healthland.time.com/2010/10/19/is-marijuana-addictive-it-depends-how-you-define-addiction/>.
- CDC Technical Instructions, laboratory testing not routinely used to determine drug use for non-immigrants. Used if drug use is suspected, and a positive result on a drug test would trigger an inadmissibility finding. While, admission to a single use of marijuana may not constitute “abuse”. Admission to use of marijuana on more than one occasion may trigger a finding that the person is a drug abuser.
- The CDC Technical Instructions provide that aliens found inadmissible under INA § 212(a)(1)(A)(iv) as drug abusers may later be admitted to the U.S. if they have remained in a period of remission for 12 months. During this 12-month period, the individual may be subject to random drug screenings to confirm remission and are not admissible until the remission period is completed.

# Documentation Requirements

- INA § 212(a)(7)(A)(i)(I) renders inadmissible any immigrant:
  - *who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title.*
- In conjunction with INA § 214(b), which provides that most non-immigrants “shall be presumed to be [] immigrants until [they] establish[] to the satisfaction of... immigration officers, at the time of applicant for admission, that [they are] entitled to non-immigrant status,” this ground of inadmissibility is used by CBP in situations where a more concrete basis (e.g., criminal or trafficking grounds) for an inadmissibility finding is not readily apparent. Thus, a person can be deemed inadmissible if CBP is not “satisfied” that the foreign national is entitled to admission in the non-immigrant classification requested.

## *Documentation Requirements (cont'd)*

- CBP has great deal of discretion. INA § 212(a)(7) can act as a catch-all provision for all types of inadmissibility findings. Official finding of inadmissibility made under § 212(a)(7). Although a § 212(a)(7) inadmissibility finding subjects the alien to the possibility of an expedited removal order under INA § 235
- CBP has discretion regarding individual whom request to his/her withdraw application for admission.

# Withdrawal of Application for Admission

- Conflict between state, foreign, and U.S. federal law is not resolved, foreign nationals who are applicants for admission are faced with questioning on marijuana use or related activities: 1) decline to respond to questioning and ask to withdraw the application for admission; or 2) truthfully respond to questioning and if found inadmissible, be prepared to seek a waiver if eligible. Waivers can take considerable time and money and may not be successful.
- If in response to questioning, the applicant is found to have engaged in misrepresentation, a waiver of inadmissibility under INA § 212(i) (for qualifying immigrants) or INA § 212(d)(3) (for qualifying nonimmigrants) “may” be available. Waivers can take considerable time and money and may not be successful.



# Related Considerations

- Electronic System for Travel Authorization (ESTA) form asks Visa Waiver applicant, “Have you ever violated any law related to possessing, using, or distributing illegal drugs?” An affirmative answer to this question can trigger an ESTA denial and a finding of inadmissibility. Form DS-160 asks “Have you ever violated, or engaged in a conspiracy to violate, any law relating to controlled substances?”
- Adjustment of status application, Form I-485 asks, in addition to questions relating to citations, arrests, criminal convictions, and misrepresentation/giving false information, “Have you EVER violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the United States, or a foreign country?”
- Naturalization application, Form N-400 asks, “Have you EVER sold or smuggled controlled substances, illegal drugs, or narcotics?” and “Have you ever committed, assisted in committing, or attempted to commit, a crime or offense for which you were not arrested?”

## Related Considerations (cont'd)

- The conflict between U.S. federal, state, and foreign law on marijuana use and associated activities is extremely complex and will undoubtedly lead to inconsistencies in admissibility determinations
- Be informed potential U.S. immigration consequences of marijuana use or business affiliation.
- CROSSING THE BORDER unprepared and misrepresentation is risky business. It may result in lifetime ban, trafficking, criminality and future immigration consequences. Each case is fact specific.
- ENGAGE IN RISK MANAGEMENT
- \*This document is not legal advise.

# Thank you

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# Workplace Sexual Harassment

**Adrian Elmslie**  
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# Legal Obligations

- Employers have a positive legal duty to protect employees from discrimination and harassment and to provide a workplace environment that is tolerant and respectful

# Legal Obligations

- Became a legislated OH&S requirement in Alberta in 2018 under Bill 30
- Employers must ensure none of their workers are subjected to or participate in harassment at the work site.
- Supervisors must ensure none of the workers under their supervision are subjected to or participate in harassment at the work site
- Workers must refrain from causing or participating in harassment

# Practical Impacts of Harassment in the Workplace

## Impact of harassment on Employees:

- High rates of absenteeism
- Low productivity / trouble concentrating / frequent errors
- Low morale
- Strained relations at home and work
- Decision to leave their jobs

## Impact of Harassment on Employers:

- Reduced productivity
- Increased absenteeism/employee turnover
- Harm to reputation and business
- Possible legal liability and costs

# Definition of Harassment

- Engaging in a course of offensive or humiliating comments or conduct that is known or ought reasonably to be known to be unwelcome
- Can be a serious one-time incident or a pattern of behaviour that persists over time
- Harassment can occur between:
  - Employee and Employee
  - Supervisor and Employee
  - Customer / Vendor and Employee



# Definition of Sexual Harassment

- Unwelcome conduct of a sexual nature, includes both physical, verbal and online conduct
- Includes gender based harassment, i.e. conduct that denigrates a persons' sexuality or vexatious conduct directed at a person because of their gender
- Depending on the circumstances, one incident could be significant or substantial enough to be sexual harassment

# Examples of Sexual Harassment

- Degrading remarks about a particular gender
- Unwelcome touching
- Unwelcome sexual requests, remarks, jokes or gestures
- Inquiries or comments about an individual's sex life
- Displaying sexually offensive pictures
- Sending sexually offensive e-mail communications
- Leering or inappropriate staring or whistling
- Unfair evaluations or reprimands, changes to terms and conditions of employment or termination of employment in retaliation for objecting to sexual harassment
- Outright demands for sexual favours or physical assault

# Motive and Intention Not Relevant

- Harassment is based on the impact on the complainant, not the intention of the harasser

*“But I was only joking...”*

*“Everyone around here makes comments like that...”*

*“He/she is way too sensitive...”*

*“I didn’t intend to offend him/her...” / “I didn’t mean anything by that...”*

*“That’s just my personality...” / “That’s just how I talk...”*

# Employee Rights and Responsibilities

- Entitled to a workplace that is free from harassment
- Carry out duties in a professional and respectful manner
- Report incidents of workplace harassment
- Co-operate in any workplace investigations
- Maintain confidentiality and discretion
- Entitled to pursue legal avenues of complaint

# Employer Responsibilities

- Positive legal duty to protect employees from harassment and to provide a workplace environment that is tolerant and respectful
- Prepare and maintain appropriate policies and programs to combat sexual harassment (OH&S requirement)
- Take complaints seriously and fairly and effectively investigate all reported incidents of alleged harassment

# Employer Responsibilities

- Failure to prevent or properly address sexual harassment can lead to claims of constructive dismissal, human rights complaints and occupational health and safety liability
- An employer can be held vicariously liable for unreported incidents and 'wilful blindness'
- There is potential liability if an employer either fails to conduct a workplace investigation or botches the investigation
- Report incidents of workplace harassment that may border on criminal conduct to the authorities as appropriate

# Employer Responsibilities – Practical Tips

- Ensure that all staff understand their rights and obligations
- Support an effective complaint procedure – do not discourage complaints
- Instruct supervisors to immediately address inappropriate comments or conduct
- Discipline those who act inappropriately

# Thank you

The Dentons logo, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

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*It's Discriminatory to do WHAT???*  
*(The case of Talos v. Grand Erie District School Board)*

**Catherine Coulter**  
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# The Aging Workforce in Canada

**20%**

of Canada's workforce  
(3.6 million) is 55 years  
and over  
(StatsCan, 2015)

**55+**

By 2021, nearly one in four workers in Canada  
could be 55 years or over  
(StatsCan, 2011)

2013 ..... 2000

**37%**

**24%**

37% of people 55 and over worked in 2013,  
up from 24% in 2000  
(Canadian Chamber of Commerce, 2013)

## Older workers tend to have:

- ✓ Lower turnover
- ✓ Emotional maturity
- ✓ Workplace loyalty
- ✓ Less need for supervision
- ✓ Lower absenteeism



## Compared to younger workers...

Older workers suffer fewer  
job-related injuries, but  
their accidents can be  
more severe with a  
longer recovery period.



Older workers may work  
slower or make decisions  
less quickly but their  
work tends to be more  
accurate.



Older workers can do the same tasks  
as younger workers, but are more  
likely to experience different types  
of injuries:

- Falls – poor balance, slower reaction times, visual issues
- Cardio-pulmonary – loss of heat, cold tolerance, over-exertion
- Health-related – diabetes, cancer, osteoporosis, hypertension
- Strains and sprains – loss of strength, endurance, flexibility



## What workplaces can do

- Conduct risk assessments that take into account aging factors
- Provide education and training
- Develop safe work procedures
- Keep equipment in good working condition
- Consider workplace improvements: mechanical assets, workstation design, floor surfaces, hand rails/grips
- Promote active living, healthy eating, stress management, and work-life balance initiatives



**Minimize**

distractions

## Tips for training older workers

- Incorporate past experience
- Provide context for information
- Allow more practice and classroom training for new situations
- Use short, active, and clearly written procedures
- Group equipment or tasks with similar functions



**Reduce**  
multi-tasking  
and activities

Workers of any age are more likely to be attracted to work and remain working if they feel their work environment is safe and healthy. **A well-designed workplace benefits everyone.**

**CCOHS.ca**  
Canadian Centre for Occupational Health and Safety

# *Talos v. Grand Erie District School Board (2018)*

- A May 2018 interim decision of the Ontario Human Rights Tribunal sent a shudder into every Ontario employer with a benefits plan.
- Wayne Talos was employed by the School Board and chose to continue working past age 65, but his group health, dental and life insurance benefits cut off at that point. He made a claim for damages of \$160,000 for age discrimination, even though the Ontario *Human Rights Code* expressly states that it isn't age discrimination to offer different benefits to an employee who is age 65 or older.
- Until Talos, section 25(2.1) of the Code, worked with the Ontario *Employment Standards Act, 2000* ("ESA") to create a distinction between workers who are under age 65 and those who are over age 65.

## *Talos v. Grand Erie District School Board, cont.*

- Although the Ontario government amended the Code in 2006 to prohibit mandatory retirement, section 25(2.1) permitted employers to cut off certain group benefits for workers when they turn 65.
- Shockingly, the adjudicator determined that at least in this particular case, it was not cost-prohibitive to continue benefits over the age of 65. The exemption under the *Human Rights Code* was therefore effectively set aside by the Tribunal.
- The adjudicator still needs to decide whether any remedy is appropriate or necessary. Only after a ruling can there be an appeal.
- **NOTE**: This decision does not apply to long-term disability or pension plan benefits.

# Thank you

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