

# Tips for avoiding employment liability in 2020

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# Everything you forgot from SARS

SARS 2.0 (aka Coronavirus or 2019-nC0V)

# Coronavirus preparedness for Canadian employers

Items for consideration in terms of protecting your workplace and limiting liability include:

- The right to restrict certain employees from the workplace (e.g. employees who have come in contact with someone with Coronavirus)
- Insisting on a medical note for employees who have been home with the flu
- Checking whether your group STD coverage will cover: (i) employees home sick with Coronavirus; and/or (ii) employees who are quarantined, even if they may not have Coronavirus
- Checking whether illness or quarantine absences are protected under statutory leave provisions in your province
- Understanding your statutory obligations when it comes to employees who need to stay home and care for a family member who is ill

# Coronavirus preparedness, con't.

- Understanding the rights of employees to refuse to attend at work if concerned about their health under applicable Occupational Health & Safety legislation
  - implementation of a temporary work from home policy?
- Understanding whether there may be a requirement on certain types of employers to provide employees with preventative equipment in the workplace (ie. gloves, masks)
- Compliance with the duty to not discriminate (eg. on the basis of ethnicity or disability)
- Implementing common sense best practices (ie. updating your emergency contact list; providing hand sanitizer throughout the workplace and to each employee; implementing certain travel restrictions; constant communication about best practices)
- Implementing a pandemic plan

# Get your house in order!

Best practices to reduce liability

# 1. Employment agreements

- Ensure they are all signed on or prior to start dates. If there are any issues, consider offering fresh consideration in exchange for the signing of new agreements.
- Ensure that consideration previously or now being provided is more than a nominal amount or an uncertain benefit (ie. stock options which may not vest or which may be underwater).
- For start-ups, ensure that all workers are classified as either employees or contractors and that written employment or contractor agreements are in place. If there was a period of time that founders were providing services for sweat equity alone, put contractor agreements into place in order to reduce the risk of future exposure for unpaid wages claims.

# Employment agreements, con't.

- Ensure that your termination provisions are up-to-date and in accordance with the current state of the law (particularly in Ontario). The more simple they are, the better.
- Keep in mind that the Ontario courts have indicated that so-called “saving provisions” won’t generally save an otherwise invalid termination provision.
- Keep in mind that if a termination provision offers the employee the greater of statutory minimums or some other formula, and the formula is not enforceable, the inclusion of the statutory provision probably won’t save the termination provision.
- Amend, amend, amend your template agreements to keep on top of ongoing changes to the law.

## 2. Bonus & commission plans

- Run your bonus and commission plans by legal counsel and don't use precedents from the internet or your prior employer. Chances are that the law has changed since then and that the precedents aren't compliant with current case-law.
- Keep in mind that once bonuses or commissions have been earned, they're likely owed through any statutory notice period, even if your plan states otherwise. In most provinces, commissions and bonuses fall under the definition of wages, and notice of termination is calculated on the basis of wages owing through the statutory notice period.

### 3. Statutory obligations

- With reference to Ontario in particular, keep in mind the fact that statutory obligations are numerous. The following obligations exist in Ontario alone: (i) training obligations under the *Occupational Health & Safety Act* (“OHSA”); (ii) policy and program obligations under OHSA; (iii) posting obligations under OHSA; (iv) JHSC committee (or equivalent) obligations under OHSA; (v) the obligation to provide each employee with a copy of the *Employment Standards Act, 2000* poster; (vi) pay equity obligations for Ontario employers with 10+ employees under the *Pay Equity Act*, and (vii) training, policy, reporting and other obligations under the *Accessibility for Ontarians with Disabilities Act* (AODA)
- Keep on top of which of your employees are properly exempt from hours of work and overtime provisions under applicable employment standards legislation, and then ensure that you properly track overtime for all non-exempt employees
- Keep on top of vacation entitlements and tracking

## 4. Other considerations to reduce liability

- Implement a Human Rights Policy together with your Workplace Harassment Policy, Workplace Violence Policy, and Workplace Harassment & Violence Program
- In the event of any complaints of harassment or discrimination, obtain legal advice, follow your policies, and consider an independent investigation rather than an internal investigation
- Put a leave policy in place to deal with different types of workplace absences. Having something to follow, even if you're just complying with statutory obligations, will reduce the risk of complaints of discrimination if your policy is a good one

# Telecommuting: considerations when employees are working remotely

By: Alison Walsh

# Telecommuting: introduction

- Telecommuting
  - meaning working from a remote location away from the employer's central workplace, with the aid of computers, internet or other electronic devices and communication
- Telecommuting is growing
  - in the U.S. regular telecommuting (not including those who are self-employed) has grown by 173% since 2005
  - November 2019 survey – 95% of U.S. knowledge workers want to work remotely and 74% would be willing to quit a job to do so
  - millennials and Gen Z are an increasing part of the workforce and having grown up in an internet-centric society they are more comfortable with new technology and more inclined to seek remote or flexible work arrangements
  - with advent of 5G networks, remote workers will have dramatically enhanced tools to enable them to collaborate in real time, share and transfer large files, have seamless video conferencing, etc.

# Telecommuting: benefits and risks

- Generally, employers are not legally required to allow employees to telecommute (absent a contractual term or accommodation obligations)
- Telecommuting can have benefits to both the employer and employee:
  - Reduces employer's operational costs;
  - Improves employee engagement and work-life balance.
- Telecommuting can also create potential risks for the employer:
  - Less control over proprietary and confidential information;
  - Liability for accidents that occur outside of the employer's premises;
  - Liability for excessive hours worked by the employee (e.g. overtime pay).

# Telecommuting policy

- One way to reduce the risks associated with telecommuting is to implement a telecommuting policy
- A telecommuting policy minimizes potential risks by setting out expectations for the employee around issues such as:
  - eligibility to telecommute
  - explaining employees responsibilities (e.g. hours of work, preserving confidential information, compliance with company policies, etc.)
  - protocols for communication with management and co-workers
  - reserving right to revoke the remote work arrangement and bring employee back into the office at the company's discretion

# Telecommuting: eligibility

- Determine up front the criteria an employee must meet to be considered for a telecommuting arrangement:
  - nature of the position
  - employee's ability to work independently, manage workload efficiently and complete work on time
  - past job performance
  - how long the employee has been employed
  - how frequently an employee can telecommute (i.e. full time, once a week, etc.)
- May be instances when a telecommuting arrangement may be part of a form of accommodation, for example
  - accommodating child care or elder care obligations
    - *Devaney v ZRV Holdings*, 2012 HRTO 1590
  - an employee may be permitted to work temporarily from home while recovering from an injury

# Telecommuting: granting requests to telecommute

- Policy should be clear that the permission to telecommute is not guaranteed
- Consider including a telecommuting trial period
- Employers should avoid giving impression that once a telecommuting arrangement is approved it is permanent
  - Employers should reserve the right to require the employee to return to work at the employer's premise.
  - Otherwise, a later request that the employee return to work at the employer's premises raises the risk of a constructive dismissal claim for altering a fundamental term of employment.
- *Staley v Squirrel Systems of Canada Ltd.*, 2012 BCSC 739
- Employers should be clear where the employee will be based
  - *Ernst v Destiney Software Productions Inc.*, 2012 BCSC 542

# Telecommuting: hours of work and monitoring

- Hours worked by a telecommuting employee can be difficult to track
- When working hours are not controlled, this may lead to issues under employment standards legislation, particularly where employees perform off-duty work
  - Wages – employees are entitled to be paid for time worked. If paid by the hour, may be entitled to wages spent working off-duty hours.
  - Overtime – employees are entitled to overtime pay when they work beyond a standard number of hours per day or week. Both hourly and salaried employees are entitled to overtime
  - Hours of Work – employee are only permitted to work a certain number of hours in a day or week
  - Record Keeping – employers must keep records of hours worked (including overtime). Failure to keep records may lead to fines/penalties or the inability to defend an employee's claim for unpaid wages.
- Unless an employee is exempt from hours of work and overtime minimums, off duty work creates liabilities

# Telecommuting: hours of work and monitoring

- Ways to limit liability, include:
  - defining the employee's hours of work
  - prohibiting employees from working off-duty hours
  - limiting employee's access to employer resources during off-duty hours
  - requiring managerial approval for unscheduled work
  - tracking employee's hours of work
    - have employees submit daily / weekly timesheets or track time worked on specific projects throughout the day
    - track network access to track working hours

# Telecommuting: health and safety

- If an employer permits an employee to work from home, depending on the jurisdiction, that location during the employee's work hours may become a workplace subject to
  - occupational health and safety legislation; and
  - workers' compensation legislation
- A home office should offer the same level of safety and security as the employee would receive at the regular work office.
- Employees should be informed that they must comply with the employer's health and safety policies when working from home.

# Telecommuting: health and safety

- Occupational health and safety legislation may require the employer to conduct a workplace inspection to identify hazards and take corrective action
- Depending on the jurisdiction, occupational health and safety may have specific rules for employees working alone that should be consulted
  - Some precautions include:
    - prohibiting employees from meeting with third parties in their home, or
    - keeping in regular contact with employee even if there is no “work” details to discuss.
- Telecommuters should understand their obligation to immediately report workplace injuries (just as they would do at the office)

# Telecommuting: equipment and technology support

- If employer is providing a computer and remote network access, consider:
  - Specifying that the equipment belongs to the company and is to be used only for business purposes
  - Stating that the employee is responsible for any intentional damage to company property;
  - Employee must return company equipment to the company when the telecommuting arrangement ends.
- Specify when employee will be reimbursed for expenses (e.g. long distance charges, internet use for business purposes)
- Depending on the jurisdiction, in certain circumstance employer's may be responsible for paying for certain expenses

# Telecommuting: security

- Employers should minimize the risk of loss of or unauthorized access to its proprietary and confidential information
- In addition to confidentiality agreements, employers can minimize risks by requiring employees to:
  - Maintain passwords on electronic devices (e.g. computer, mobile phone)
  - Keep physical records or electronic devices when not being used in a locked filing cabinet
  - Do not share passwords for equipment related to employee's work with anyone outside the company's organization
  - If unauthorized disclosure occurs, the employee must immediately inform the company

# Ending the employment relationship of long service employees: pension, benefit and compensation strategies

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# Overview

- Registered pension plans, supplemental pension plans
- Retiring allowances
- Deferred compensation e.g. stock options and other equity compensation
- Employee benefits
  - advanced planning considerations

# Registered pension plans

- Defined benefit or defined contribution?
- Employee or executive plan?
- Individual pension plan (IPP)?

# Registered pension plans (cont.)

- Funding status of RPP
  - Financial implications in terminating an employee that may impact decision on timing and settlement of pension obligations to employee/executive
- Transferability / settlement of RPP entitlements
  - Is the employee able to transfer commuted value of RPP entitlements and are there any tax considerations for doing so?

# Registered pension plans (cont.)

- Historical plan design / governance considerations
  - DB → DC Conversions / liability for past practices or omissions?
- Was the employee promised anything at date of hire for pension accrual, distinct from other employees?
- Could your DB Plan allow granting of past service accrual

# Retiring allowances

- Useful tool to settle obligations post-termination in recognition of loss of employment
- Can be paid out over a term *other than* the statutory or common law notice period
- *Income Tax Act (ITA)* considerations

# Deferred compensation

- Careful review and planning required before terminating members of deferred compensation plans
  - Plan provisions regarding acceleration of vesting, crystallization, stock purchase rights
  - Differential interpretations of “cause” vs. “good reason” and conflicts between agreements
  - Stock purchase plan considerations

# Deferred compensation (cont.)

- Deferred bonus and other compensation payable after termination
  - Forfeiture of bonus or pro rata distribution under terms of employment agreement
- Consider tax jurisdiction of employee
  - e.g. U.S. tax filers, 409A
    - 6-month restrictions on payments after termination; significant tax penalties

# Deferred compensation (cont.)

- Retirement Compensation Arrangements (RCAs)
  - Useful tax planning tool in some employment contexts

# Employee benefits

- Consider whether Long Term Disability (LTD) and Extended Health & Dental (EH&D) can be bridged during notice period
- Can employee benefits be settled through lump sum payments
- Ensure employees are informed and understand right of conversion for Life and LTD
- Communication of these issues is crucial

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# Where are we going with notice periods?!

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# Reasonable notice – general overview

- Reasonable notice
  - Overview
    - Employment standards minimums
    - Absent enforceable termination provision employers are required to provide reasonable notice upon termination
    - General common law test (age, years of service, position, availability of similar employment)
  - Overview of developments in the area of reasonable notice in 2019 – are notice periods going up?

# Cap on notice periods - limited to 24 months?

## *Dawe v. Equitable Life Insurance Company of Canada, 2019 ONCA 512*

- Facts
  - Senior Vice President
  - 37 years of service
  - 62 years old
- Lower Court Decision:
  - Judge awarded 30 months of notice
    - Stating he would have gone as high as 36 months

## Notice limited to 24 months

### *Dawe v. Equitable Life Insurance Company of Canada, 2019 ONCA 512*

- Court of Appeal:
  - Award reduced to 24 months of notice
    - Reasonable notice is determined on a case-specific basis
    - “Generally only exceptional circumstances will support a base notice period in excess of 24 months”

# Conclusions and key takeaways

## *Dawe v. The Equitable Life Insurance Company of Canada, 2019 ONCA 512*

- Notice periods over 24 months:
  - Only in exceptional circumstances
    - For instance, senior employees with extraordinary length of service
- Reduce liability by including enforceable termination provisions in employment contract
  - Ensure all employment agreements have enforceable unambiguous termination provisions – consistent with Employment standard legislation
  - Ensure new offer letters provided to employees upon promotion have (or continue to have) termination provisions
  - Review all employment agreements to ensure termination provisions are enforceable

# Thank you



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