

Dentons' Ottawa 21st annual employment law client appreciation seminar webinar

September 22, 2020



Meet our presenters



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



Julia Dales, Associate
Ottawa
D +1 613 783 9687
E julia.dales@dentons.com



Stephanie V. Lewis, Counsel
Ottawa
D +1 613 783 9651
E stephanie.lewis@dentons.com

What's new and exciting in employment law in 2020?

Catherine Coulter, Counsel
Ottawa



Reaction of Ontario employees to 2020 court decisions...



Reaction of Ontario employers to 2020 court decisions...



1. *Waksdale* (Ont. C.A.)(2020)

- What's wrong with this termination without cause provision?

“You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the [Employment Standards Act 2000](#) as amended. All reimbursement for business expenses shall cease as of the date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not as yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.”

Waksdale, con't.

- How about the termination for cause provision?

It is understood that grounds for immediate termination without notice includes:

- (i) solicitation of the Company's customers or in connection with the business of the Company, whether directly or indirectly, either orally or in writing, on the internet or otherwise, including such websites as Facebook, LinkedIn and Twitter, for personal gain or profit;*
- (ii) use of information, such as the Company's customer list, or in respect of the business of the Company, for personal gain or profit;*
- (iii) disclosing any of the Company's confidential information to any unauthorized person, enterprise or entity, without first obtaining the written authorization from the Company. Such disclosure includes, but is not limited to, publishing the names of the Company's customers or businesses (or their representatives) which the Company is targeting as a future customer, either orally or in writing, on the internet or otherwise, including such websites as Facebook, LinkedIn and Twitter;*
- (iv) commission of a criminal offence punishable by law under the Criminal Code of Canada or any other provincial or federal statute: (a) of such serious and substantial nature, as determined by the Company acting reasonably, which would materially injure and/or impede the reputation of the Company if you were retained as an employee; or (b) involving an act of dishonesty relating to the Company such as embezzlement, theft or fraud;...*

Waksdale, con't.

(v) failure to immediately inform management of receipt of gifts or favours valued at greater than \$100.00 annually; [emphasis added]

(vi) violation of any applicable human rights legislation or non-discrimination policy that the Company may establish at any time in the future;

(vii) any action or conduct that would constitute harassment or violence at the workplace;

(vii) engaging in any activity which likely competes with the Company, compromises the position of the Company, or causes a conflict of interest by preventing you from fully and objectively performing your duties and obligation in a particular situation, or a perceived conflict of interest;

(ix) communicating, electronically or otherwise, in a manner that is: discriminatory or harassing; derogatory or demeaning to any individual or group; obscene, sexually explicit or pornographic; defamatory or threatening; in violation of any license governing the use of software or other intellectual property; or, in any manner that is illegal or contrary to the Company's policy or business interests;

(x) making any comments, directly or indirectly, either orally or in writing, on the internet or otherwise, including such websites as Facebook, LinkedIn and Twitter, of a negative, disparaging, defamatory or slanderous nature about the Company, its employees, officers, directors or associated companies, or your relationship with the Company;...

Waksdale, con't.

(xi) fundamental breach of your duties as set out in this agreement or in any schedules to this agreement;

(xii) material inaccuracies on your resume, job application, or information provided by you in the interview process with the Company;

(xiii) documented warnings with respect to the performance of your duties that the Company considers to be unsatisfactory; and,

(xiv) any matter recognized by the Courts to justify termination for cause.

If the Company terminates your employment pursuant to this Section, you shall be entitled to receive your then current unpaid base salary set out above accrued to the date of termination and the Company shall not be required to pay any anticipated remuneration, and all benefits shall be discontinued as of the date of termination.

Waksdale, con't.

- A possible fix?

“Subject at all times to the minimum requirements of the *Employment Standards Act, 2000* (Ontario), as amended from time to time (the “ESA”), your employment may be terminated at any time without notice, pay in lieu of notice or severance: (i) in the event of just cause under common law; or (ii) in the event of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the Company.”

or

“The Company may terminate your employment at any time, for cause under common law or a statutory equivalent under applicable employment standards and/or labour standards legislation (“Employment Standards”), without notice of termination or pay in lieu of notice or any applicable statutory or common law severance, subject always to the minimum requirements of Employment Standards.”

2. Battiston (ONSC)(2020)

- The Company's stock plan contained the following provision:

“... Awardee’s Continuous Status as a Participant will be considered terminated as of the date Awardee no longer is actively providing services to the Company or a Subsidiary (regardless of the reason for such termination and whether or not later to be found invalid or in breach of employment laws in the jurisdiction where Awardee is employed by the terms of Awardee’s employment agreement, if any)…”

- In addition, the email which accompanied Mr. Battiston’s award grants also included the following language: *“A record will be save[d] indicating that you have read, understood and accepted the stock award agreement and the accompanying Plan documents. Please note that failure to read and accept the stock award and Plan documents may prevent you from receiving shares from this stock award in the future.”*

Battiston con't.

- A possible fix?

“Please note that the terms and conditions of the Plan provide that the vesting of options ceases as of the date of notice of termination or notice of resignation of employment, without regard to any statutory, contractual or common law notice of termination period. Likewise, there is no entitlement to damages in lieu of the lost opportunity to vest otherwise unvested options. *[The Plan may also require exercising option-holders to become a party to the Company’s shareholders agreement, and which may include certain transfer and voting restrictions and a right permitting the Company to repurchase shares issued to you upon the exercise of options.]*”

3. *Rutledge v. Canaan Construction Inc.* (ONSC)(2020)

- Rutledge, who was a construction worker, had the following termination without cause provision in his employment agreement:

“The Employee may be terminated at any time without cause upon being given the minimum periods of notice as set out in the Employment Standards Act, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation. The Employee acknowledges that pursuant to the Employment Standards Act they are not entitled to any notice or time in lieu thereof due to the nature of their job and as such they are entitled to absolutely no notice or pay and benefits in lieu thereof upon termination.

The termination provisions set forth above, represent all severance pay entitlement, notice of termination or termination in lieu thereof, salary, bonuses, vacation pay and other remuneration and benefits payable or otherwise provided to the Employee in relation to the termination of the Employee regardless of cause or circumstances.”

4. Ontario's COVID-19 related leaves

Infectious Disease Emergency Leave

- Deemed infectious disease emergency leave (due to reduction or elimination of the employee's hours of work, including temporary layoffs that were converted to the leave).
- Was scheduled to end on September 4th but has been extended to January 2, 2020.

Emergency Leave; Declared Emergencies and Infectious Disease Emergencies

- An employee is entitled to take this leave under section 50.1(1.1)(b) of the ESA due to one of more of the following reasons:
 - (i) the employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.
 - (ii) the employee is acting in accordance with an order under section 22 or 35 of the Health Protection and Promotion Act that relates to the designated infectious disease (including public health recommendations that people age 70+ self-isolate).
 - (iii) the employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

Infectious disease leaves con't.

Emergency Leave; Declared Emergencies and Infectious Disease Emergencies, con't.

(iv) the employee is providing care or support to an individual referred to in subsection (8) (i.e., spouse, child, parent, etc.) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.

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

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

- Subsection 2(1) of Ontario Regulation 228/20 under the ESA designates COVID-19 as an infectious disease for the purposes of section 50.1 of the ESA, with no current end date to that designation. As such, as long as an employee is “not performing his or her duties because of” one of the above six reasons, at present they can continue on this leave indefinitely.

5. *Cormier v. St. Joseph Communications* (Ont. C.A.)(2019)

- Ms. Cormier was an independent contractor for 10 years from 1994 to 2004. Among other things, she treated herself as a contractor. She subsequently signed a series of employment agreements with same company over the course of a further 13 years, from 2004 until her termination in 2017.
- Each employment contract confirmed that Ms. Cormier was only entitled to ESA minimums on termination, and that her start date of employment was 2004.
- At the Ontario Superior Court of Justice, the court made the following findings:
 - During Ms. Cormier's years working as an independent contractor, she was really a 'dependent contractor'
 - Ms. Cormier's termination package should include her years of service as a dependent contractor
- What did the Court of Appeal decide?

Top five costly HR mistakes

Stephanie Lewis, Counsel
Ottawa



What are the top five costly HR mistakes to avoid?

Common areas for mistakes

- Vacation pay rules
- Hours of work and overtime rules
- Improper consideration for signing a new contract
- Misclassifying employees as contractors
- Commissions and incentive bonuses



Vacation pay

Vacation pay

Potential areas for error:

The amount:

- Does it meet with statutory minimum requirements?
- If employees are being provided with amounts in excess of statutory minimums, how are the excess amounts treated if unused?

The timing:

- Are employees using their vacation within the timeframe required by statute?
- How are unused vacation days being handled?

Vacation pay

Potential areas for error:

Difference between Vacation Time and Vacation Pay:

- Employees are entitled to both

Vacation Pay:

- What income should be included when calculating vacation pay?
- See definition of “wages” under the ESA
- Issue of discretionary v. non-discretionary bonuses
- When is vacation pay to be paid?

Vacation pay

Potential areas for error:

When does vacation accrue:

- Employees will continue to accrue vacation during both active and inactive employment

Hours of work and overtime rules

Hours of work and overtime rules

Who is entitled to overtime?

- Employees whose work is not supervisory or managerial in character.

Who is considered a supervisor or manager?

Who is not entitled to overtime?

- IT professionals
- Firefighters
- Hunting, fishing or wilderness guides
- Landscape gardeners
- Students at camps for children
- Taxi drivers
- Ambulance drivers
- Live-in superintendents, janitors or caretakers of residential buildings
- Certain defined professionals

Hours of work and overtime rules

When is overtime triggered?

- Employees are entitled to overtime for every hour worked in excess of 44 hours per week under the ESA or 40 hours per week under the CLC.
- If there is an averaging agreement, an employee's hours of work can be averaged over periods of 2 or more consecutive weeks.
- Employees can be compensated for overtime hours using paid time off in lieu of overtime.
- **Rate:** The time in lieu must be provided at a rate of one and a half paid time off for every overtime hour worked.
- Must have a time in lieu agreement
- **Timing:** In lieu must be taken:
 - within 3 months of the week in which it was earned; or,
 - within 12 months of that work week with the employee's agreement

Hours of work and overtime rules

Questions for consideration?

- Are we addressing overtime entitlements in employment agreements?
- Is everyone entitled to overtime being paid overtime when they exceed the overtime threshold?
- What measures do we have in place to track the hours of employees who are eligible for overtime?
- If we want to provide time in lieu of overtime, do we have time in lieu agreements?
- If we want to average employee hours worked over several weeks, do we have the necessary agreements in place with employees?

Improper consideration for signing a new contract

Consideration requirements

In Ontario, for an contract to be binding, there needs to be:

1. an offer,
 2. acceptance, and
 3. consideration.
- Consideration is something of value that the employee was not entitled to prior to signing the new agreement.

Consideration requirements

- These contract rules apply to new employment agreements that are given to existing employees.
- Consideration for new agreements is required and can take a number of forms:
 - A signing bonus conditional on receipt of the signed agreement;
 - A pay raise conditional on execution of the new agreement;
 - Increased benefits conditional on execution of the new agreement;
- Using equity as consideration can be risky.
 - May lose its value, in which case the employee will not have received consideration.

Consideration requirements

How much consideration is required for a new employment agreement?

- There is no case-law indicating a minimum amount required to constitute proper consideration.
- Recommendations:
 - Senior employees
 - Junior to mid level employees

Consideration requirements

- **Consequence of not providing consideration:**
 - New agreement not binding and previous terms of employment will continue to govern
- **Best practices for new agreements:**
 - Clearly indicate fresh consideration
 - Make consideration condition upon executing the agreement
 - Give the employee time to review the new agreement before signing

Misclassifying employees as contractors

Employees v. independent contractors

- Employees are entitled to all the protections and rights afforded under the *Employment Standards Act, 2000* (“ESA”).
- Independent contractors do not enjoy the same statutory rights.
- Misclassifying employees as contractors breaches the ESA and exposes employers to penalties.

Employees v. independent contractors

- The assessment as to whether an individual is an employee or a contractor requires a review of the entire relationship to determine the level of control that the business has over the individual and the manner in which that person performs their work.

Employees v. independent contractors - Factors

1. **Control:** Who controls the following aspects of the work:
 - a. the amount of work;
 - b. the nature of it;
 - c. where it is performed; and
 - d. how it is performed.

Employees v. Independent Contractors - Factors

2. Which party bears the ultimate risk of loss or profit from the work?

- If the individual stands to earn an increased profit or loss based on performance of the work, that person is more likely an independent contractor.

Employees v. independent contractors - Factors

3. Which party owns the tools required to perform the work?

- If it is the worker, this is indicative of a contractor relationship.

Employees v. independent contractors - Factors

4. Is the worker an integral part of the organization?

- If so, the person is more likely to be an employee. If the services are ancillary or separate however, they would more likely be considered a contractor

Employees v. independent contractors - Factors

5. Additional considerations:

- Does the business deduct income tax, pension amounts or employment insurance from payments made?
- Is the worker required to exclusively provide services to that business?
- Does the worker submit invoices for work performed?

Employees v. independent contractors – Middle classification

- There is a type of contractor between independent contractor and employee – a dependent contractor.

Employees v. independent contractors – Best practices

- We recommend reviewing your independent contractor relationships.
- For those where there is a risk due to the nature of control exercised by the business, consider providing employment agreements to protect against potential ESA breaches.

Commissions and incentive bonuses

Commissions and incentive bonuses

- Importance of written plans
 - Clarify entitlements and expectations
- **Commission considerations:**
 - When are they considered earned?
 - Payments on termination
 - When and how can the plan be amended or discontinued?

Commissions and incentive bonuses

Bonus considerations:

- Are they discretionary or performance based?
- When are they considered earned?
- When are they payable?
- Entitlements on termination
- When and how can the bonus plan be amended or discontinued?

Top five statutory mistakes

Julia Dales, Associate
Ottawa



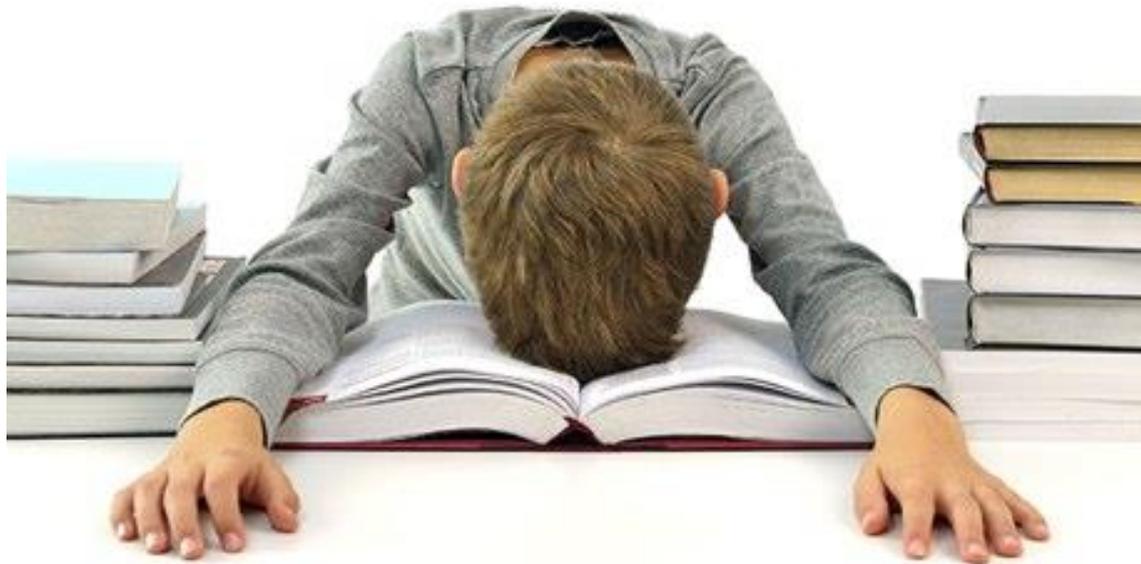
1. Policies

2. Programs

3. Plans

4. Training

5. Postings



Policies

- ***Accessibility for Ontarians with Disabilities Act, 2005 (AODA) Policy***
 - Required for all organizations
 - 50+ employees:
 - ✓ Include statement of commitment
 - ✓ Make policies publicly available
 - ✓ Ensure accessible format available on request
- **Occupational Health and Safety Policy**
 - Required for organizations with 5+ employees
- **Workplace Violence Prevention Policy**
 - All organizations
- **Workplace Harassment Policy**
 - All organizations

Occupational Health and Safety Act (OHSA)

Workplace Health & Safety Representative/Committee:

- 5 or more employees or if designated substance regulation applies to workplace
 - Workplace health and safety representative
 - employee who does not exercise managerial functions
- 20-49 employees
 - Joint Health and Safety Committee with at least 2 members
 - 1 member who exercises managerial functions and 1 to represent workers
- 50 or more employees
 - Joint Health and Safety Committee with at least 4 members
 - Including 1 who exercises managerial functions and 1 to represent workers

Other: First Aid Requirements **(if covered by WSIB)**; Comply with the OHSA regulation entitled Workplace Hazardous Materials Information System (WHMIS) **(if hazardous materials onsite)**; Register with WSIB **(if Schedule 1/Schedule II employer)**

Programs

- **Occupational Health and Safety Program**
 - Organization with 5+ employees
 - Review annually
- **Workplace Violence Prevention Program**
 - All organizations
 - Assessment ∞ risk control/response ∞ emergency assistance procedures ∞ reporting ∞ investigations ∞ domestic violence
 - Reassess as often as necessary
- **Workplace Harassment Program**
 - All organizations
 - Reporting ∞ investigation ∞ confidentiality ∞ results
 - Review annually

Plans

- Multi-Year Accessibility Plan
 - Applies to organizations with 50+ employees
 - Update Plan every 5 years
 - Must be in writing & available in accessible format on request
 - Reporting obligations

- Pay Equity Plan
 - Only required for Part II employers → 100 employees on Jan 1, 1988
 - Otherwise → no Plan, but require pay equity practices

Pay equity

Pay equity:

- Job rate equal in female/male job classes that have comparable work
- Applies to public and private sector Ontario employers with 10 or more employees

Responsibilities of Part I employers:

- Implement compensation practices that provide for pay equity
- Undertake comparisons between each female and male job class in terms of compensation and value of work performed
 - Value of work performed means → skill, effort, responsibility required, performance conditions)
 - Comparison involves → classifying, valuing, comparing, adjustments
- Post Notice of Requirement to Achieve and Maintain Pay Equity

Responsibilities of Part II employers

- Create Pay Equity Plan, amend as required
- Post Pay Equity Plan
- 1% spending requirement

Training

- *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)*
- Worker Safety Awareness
- Supervisor Safety Awareness
- Joint Health and Safety Committee Certification
- Workplace violence and harassment
- Workplace Hazardous Materials Information System (WHMIS)
 - Only if hazardous materials onsite

Postings

- Notice of requirement to achieve and maintain pay equity
- *Occupational Health and Safety Act*
- WSIB's "Health & Safety at Work: Prevention Starts Here" poster
- WSIB's "In case of injury" poster
 - **if covered by WSIB**
- Workplace Harassment Policy
 - **if 5+ employees**
- Workplace Violence Policy
 - **if 5+ employees**
- Names and work locations of H&S Committee members
 - **if 20+ employees**
- Employment Standards in Ontario Poster (no need to post but must distribute)

Remote work best practices: Preparing for Phase 2 of COVID-19

Catherine Coulter, Counsel
Ottawa



Remote work reminders...

- Do I really have liability for the occupational health and safety of my employees working from home?
- Possible overtime issues when employees are in their workplace 24/7
- My employee is working from a their cottage in Quebec or their parent's home in Europe. Does that present any issues?
- What do you mean my 3 year old can't watch Paw Patrol on my work laptop? (confidentiality issues in a virtual workplace)



Presenters bios



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

Catherine Coulter (She/Her/Hers) practices employment and labour law as a member of the Litigation and Dispute Resolution group of Dentons' Ottawa office. Although she principally represents and advises clients on employment and labour matters, she also acts in the fields of general commercial litigation, insurance litigation and privacy and data management.

Catherine represents and advises employers in high tech and other industries and works with them to limit liability and ensure regulatory and legal compliance. She advises on executive compensation, employment issues in business transactions and reorganizations, employment disputes and privacy matters including data protection and data breach counseling. Catherine is also highly experienced in alternative dispute resolution. Catherine regularly speaks at seminars and blogs on a variety of employment and privacy topics. She is the Ottawa office Pro-Bono Committee Lead.



Julia Dales, Associate
Ottawa
D +1 613 783 9687
E julia.dales@dentons.com

Julia Dales is an associate in Dentons' Litigation and Dispute Resolution group. Based in Ottawa, Julia's multi-faceted practice encompasses all aspects of civil litigation, employment and labour, and privacy law.

As a litigator, Julia provides strategic counsel on complex commercial disputes, focusing on practical and cost-effective solutions for her clients. She has a successful track record representing a number of clients in the Ontario Small Claims Court and on matters before the Ontario Superior Court of Justice. Julia has also represented clients in various ADR forums.

In her employment practice, Julia advises clients on a wide range of employment and labour law matters, including terminations, wrongful dismissal claims, human rights complaints, and acquisitions.

As a member of Dentons' national Privacy and Cybersecurity team, Julia advises clients on compliance matters with respect to the collection, use, and protection of personal information.

Presenters bios



Stephanie V. Lewis, Counsel
Ottawa
D +1 613 783 9651
E stephanie.lewis@dentons.com

Stephanie Lewis (She/Her/Hers) is counsel in **Dentons' Litigation and Dispute Resolution** group with a focus on employment and labour. Since her call to the Ontario Bar in 2009, Stephanie has had the privilege of applying a respectful and practical approach to litigation in order to protect her clients' rights. Prior to joining Dentons, Stephanie practiced in all areas of civil litigation at a bilingual Ottawa litigation boutique firm.

Stephanie has appeared before and/or assisted on matters before the Ontario Superior Court of Justice, the Ontario Court of Appeal, the Divisional Court, the Human Rights Tribunal of Ontario, Provincial Offences Court, the Ontario Labour Relations Board, the Landlord Tenant Board, and the Ontario Municipal Board.

While obtaining her law degree at the University of Ottawa, Stephanie was a peer advisor, a member of the student government executive, and volunteered with Pro Bono Students Canada. Stephanie graduated cum laude and received the Perley-Robertson, Hill and McDougall LLP Prize for highest standing in Federal Tribunals Practice, as well as the Shore, Davis & McGarvey Prize for highest standing in Selected Issues in Feminist Law

Thank you!

Dentons' Ottawa office:
99 Bank St #1420
Ottawa, ON
K1P 1H4