

Employment and Labour trends for 2022

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

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Ontario legislative updates

Matthew Curtis

Bill 27: Working for Workers Act

Non-Competition Agreements

On November 30, 2021, the Ontario government passed the *Working for Workers Act* (“**Bill 27**”).

(Limited) Ban on Post Employment Non-Competition Agreements

- Under Bill 27, employers in Ontario are prohibited from entering into non-compete agreements with employees.
- Applies to non-competes that apply after the employment relationship between the employee and the employer ends.
- Ministry of Labour’s position is that the ban applies for non-compete agreements entered into after October 25, 2021.

Exceptions

- Where there is a sale or lease of a business or part of a business and the seller/lessor becomes an employee of the purchaser as part of the sale or lease.
- Where the employee is an executive (i.e., President or C-level executive).

Right to Disconnect policies

- Employers with 25 or more employees on January 1st of any year will need to have a written policy in place with respect to disconnecting from work before March 1st of that year.
- “Disconnecting from work” means “not engaging in work-related communications including emails, telephone calls, video calls, or the sending or reviewing of other messages, so as to be free from the performance of work”.
- For 2022, employers have until early June 2022 to implement the Right to Disconnect policy.
- Employers must provide a copy of the policy to existing employees within 30 days of preparing the policy, or within 30 days of the date that a new hire becomes an employee.

Extension of WIPB and IDEL

WIPB extended to July 31, 2022

- The Worker Income Protection Benefit (“**WIPB**”) program provides employees who require time off work for COVID-19 related reasons with up to \$200 per day for up to three days of leave.
- Eligible employers are entitled to reimbursement from WSIB for up to \$200 per employee per day taken.
- Employers will need to provide eligible employees that have not exhausted their entitlements with three paid days of IDEL if they meet the prescribed conditions.

Deemed IDEL extended to July 30, 2022

- Deemed infectious disease emergency leave (“**IDEL**”) is a job-protected leave for non-unionized employees whose hours of work are reduced or eliminated as a result of the COVID-19 pandemic.
- Employees on IDEL are not considered to be on temporary leave or to have been constructively dismissed under the statute.
- The clock for a temporary layoff period does not begin to run during the IDEL period.

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BC's Paid Sick Leave

Eleni Kassaris

Overview

- All employees covered by the British Columbia *Employment Standards Act* with over 90 days of consecutive employment are entitled to five (5) paid days of leave per “employment year” for any personal illness or injury as well as three (3) days of unpaid sick leave as job-protected leave.
- No distinction is made between full-time, part-time or casual employees.
- The days must be taken in one day increments and do not have to be taken consecutively.
- The employer can request “reasonably sufficient proof” that the employee is entitled to the leave.
- The leave does not carry over from year to year if not used.
- Employment is deemed continuous during the leave and employers cannot terminate any employee or change a condition of employment as a result of the leave without consent of the employee.
- The legislation came into force January 1, 2022 and replaced the previous three paid days that were implemented during the last half of 2021 to permit paid time off for Covid-related reasons.
- Covid-vaccination paid leave for up to 3-hours per dose remains a separate entitlement that has not been repealed.

What is the “employment year?”

- Each employee has their five days allotted based on their employment year, not the calendar year.
- The employment year is measured from the start date of employment.
- The practical impact of this is that employees can theoretically have 10 paid sick days in one calendar year.
- Example:
 - Employee is hired on April 1, 2021. The employer does not have a paid sick leave policy.
 - From January 1, 2022 to March 31, 2022, the employee can take five paid sick days.
 - From April 1, 2022 to March 31, 2023, the employee can take five paid sick days.
 - If the employee takes five paid sick days prior to March 31st this year and five more between March 31st but before December 31st, the employee would have received 10 paid sick days in one calendar year.

How is a paid sick day calculated?

- an employer must pay an employee who takes paid sick leave (a) an amount in money equal to at least the amount calculated by multiplying the period of the leave and the average day's pay, where the average day's pay is determined by the formula

$$\text{amount paid} \div \text{days worked}$$

- Where “amount paid” is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30-calendar day period preceding the leave, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and “days worked” is the number of days the employee worked or earned wages within that 30-calendar day period.

Calculation example

It is January 28, 2022. A salesperson calls in sick and indicates they want to use a sick day. The salesperson worked 18 out of the 30 days before January 28, 2022, 8 hours per day, Monday to Friday. The employee earns \$6,000 per month plus commission. In the last 30 days, the employee earned their salary and \$10,000 in commission. How much is the employee entitled to be paid for January 28, 2022?

- In this example, the regular wage needs to be calculated first, as follows:
 - \$6,000 per month x 12 months = \$72,000 (annual salary)
 - \$72,000 divided by 52 weeks = \$1,384.62 (weekly salary)
 - \$1,384.62 divided by 40 hours per week = \$34.62 (regular wage)
 - \$34.62 x 8 hours per day x 18 days = \$4,985.62 (\$276.96 per day worked in the period)
- Other wages earned in the period (commissions in this example) then need to be added to the regular wage for the period.
 - \$4,928.62 + \$10,000 = \$ 14,928.62
 - \$14,928.62 divided by 18 days worked = \$832.48
- The sick pay entitlement in this example would be \$832.48 for one sick day

What is “reasonable proof?”

- If requested, the employee must “as soon as practicable” provide the employer with reasonably sufficient proof to show that an illness or injury was the basis for the absence.
- What is “reasonably sufficient proof” should be approached with “flexibility” and “a balancing of the rights and the obligations of the employee and the employer.”
- Examples of reasonable proof:
 - A receipt from a drugstore or pharmacy
 - A medical bracelet from a hospital
 - A note from a doctor, nurse practitioner, therapist, etc.
 - Credible verbal information
- Requested proof should be “proportionate”
 - For an employee that takes one or two sick days a year, you may choose to simply rely on verbal representations.
 - Where sick days are frequently taken on Fridays or Mondays, you might escalate the form of proof required and ask for a doctor’s note.

What about statutory holidays?

- Paid sick leave and statutory holiday pay are separate entitlements.
- If an employee qualifies for statutory holiday pay and is scheduled to work on the statutory holiday but calls in sick, they would be entitled to an average day's pay for both the statutory holiday and the sick day.

Frequently Asked Questions

Can we create a common reference date to the calendar year like we can for vacation?

- No. The legislation refers to the “employment year” which is measured from each employee’s start date.

Can we provide time off in half day increments?

- No. There are no provisions for prorating or subdividing the entitlement. In fact, in some circumstances, you may owe someone who calls in sick for a half day shift a full day’s pay, depending on how much the employee earned in the preceding 30 days.

If our sick leave or PTO policy confers better entitlements does the legislation still apply?

- Yes. You can modify or supplement your existing policies to account for these five days, but the legislation cannot be replaced by your policy.

I already have a collective agreement that gives sick days to bargaining unit members. Is that good enough?

- That depends. The collective agreement will replace the legislation only where the collective agreement provisions “when considered together, meet or exceed the requirements” of the ESA. If they do not, then the ESA provisions are incorporated by reference.

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Federal Paid Sick Leave

Larysa Workewych

Current “sick day” entitlements under the *Code*

- Federally regulated employees are entitled to up to 5 personal leaves days in every calendar year.
 - First 3 days are paid if the employee has 3 or more consecutive months of employment.
- Personal leave days can be taken for the following reasons:
 - **Treating illness or injury;**
 - Carrying out responsibilities related to the health or care of the employee’s family members;
 - Carrying out responsibilities related to the education of the employee’s family members who are under 18;
 - Addressing any urgent matter concerning the employee or their family members;
 - Attending the employee’s citizenship ceremony under the *Citizenship Act*; and
 - Any other reasons prescribed by regulation.

Current medical leave entitlements under the *Code*

- Federally regulated employees are entitled to up to 17 weeks of medical leave as a result of:
 - Personal illness or injury;
 - Organ or tissue donation; or
 - Medical appointments during working hours.

What is changing?

- “Treating illness or injury” will no longer be a reason under the personal leave day provisions.
- Medical leave is being expanded to include up to 10 paid days of medical leave.
 - For existing employees, the first 3 paid days will be earned 30 days after the changes come into force, and after 60 days of continuous employment the additional days earned at a rate of 1 day per month.
 - For new employees hired in the calendar year the changes comes into force, the first 3 days will be earned 30 days after starting their job, and after 60 days of continuous employment the additional days are earned at a rate of 1 day per month.
 - For future calendar years, earned at a rate of 1 day of medical leave with pay for each month of employment after 1 month of continuous employment, up to a maximum of 10 days in a calendar year.

What is changing?

- Paid medical leave not taken in a calendar year carries forward to January 1st of the following calendar year and counts toward the 10 days that can be earned in that new year.
 - i.e. the maximum days of paid medical leave that can be taken in a calendar year is 10.
- Paid medical leave days are compensated at employee's regular rate of wages for their normal hours of work.
- Employers can request a medical certificate in writing if the employee's medical leave with pay is 5 consecutive days or longer.
- Bereavement leave under the *Code* also amended to provide up to 8 weeks of leave for employees who lose a child or experience a stillbirth.

When do these changes come into effect?

- Bill C-3 received royal assent on December 17, 2021.
- However, sections relating to paid medical leave and bereavement leave come into force by Order in Council.
 - No Orders in Council have been issued yet.
- Federal Government plans on convening with the provinces and territories in early 2022 to develop a “national action plan” for legislated paid sick leave for all workers across Canada.



2022 Employment and Labour trends to watch

Andy Pushalik

COVID-19 compliance matters set to continue

- Mandatory Vaccination caselaw continues (and will continue) to develop:
 - *Bloomfield v. Service Employees International Union*: Union's decision not to grieve employer's vaccination policy not breach of duty of fair representation.
 - *Teamsters Local Union 847 v. Maple Leaf Sports and Entertainment*: Arbitrator dismissed arena employee's grievance against unpaid leave when employee failed to disclose vaccination status.
- Ontario Employers wait for clarification on IDEL and constructive dismissal.
- ***The tool you need for 2022 - Dentons Chart of Status of Lockdown Measures Chart***

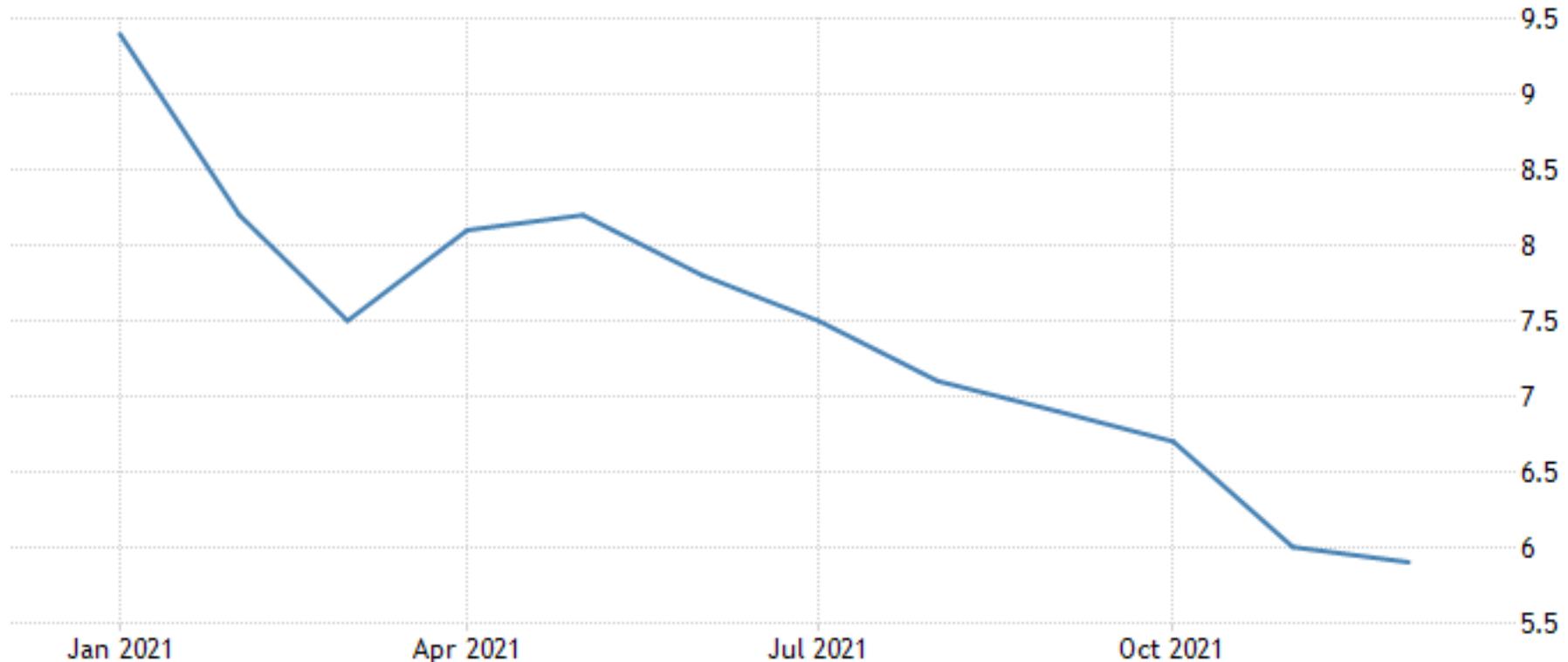
Work from Anywhere...

- Employers are implementing programs to allow employees to work for a certain period of time anywhere in the world
- Implications to consider:
 - Immigration Laws
 - Tax Laws – For the Employee and the Employer
 - Employment Laws
 - Privacy Laws

Mitigation becomes a strong defence to wrongful dismissal matters

- Basic Principles of Mitigation:
 - A dismissed employee has a duty to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available.
 - Onus is on the employer to prove that:
 - the employee failed to take reasonable steps to mitigate; and
 - the employee could likely have obtained alternative employment had s/he taken reasonable steps
 - “Reasonable notice is assessed at the time the decision is made; mitigation is assessed in light of the actual efforts of the plaintiff in the actual circumstances he then faced.”
 - *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998

Mitigation becomes a strong defence to wrongful dismissal matters



SOURCE: TRADINGECONOMICS.COM | STATISTICS CANADA

Restrictions on Non-Disclosure Agreements

- PEI passed *Non-Disclosure Agreements Act* on November 17, 2021; law becomes effective May 17, 2022
- Effective May 17, 2022, non-disclosure agreements in cases of harassment or discrimination will only be permitted “...if such an agreement is the expressed wish and preference of the relevant person concerned.”
- Where a non-disclosure agreement is permitted, the agreement shall only be enforceable where:
 - the relevant person has been offered, in writing, independent legal advice;
 - there have been no undue attempts to influence the relevant person in respect of the decision to include a requirement not to disclose any material information;
 - the agreement does not adversely affect the health or safety of a third party, or the public interest;
 - the agreement includes an opportunity for the relevant person to decide to waive their own confidentiality in the future and the process for doing so; and
 - the agreement is of a set and limited duration
- The new law does not prohibit the inclusion or enforcement of a provision in a settlement agreement that precludes the disclosure of the amount paid in the settlement of a claim.

Employment and Labour trends for 2022 webinar will begin shortly

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Thank you



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