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Day 2

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**ONTARIO EMPLOYMENT AND
LABOUR FALL WEBINAR SERIES**

OCTOBER 12-14, 2022

Presenters



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Pamela Chan Ebejer
Unique compensation issues

Benefits after termination

- Unless there is an enforceable termination provision or willful misconduct, willful neglect of duty that is not trivial and has not been condoned by the employer, employees are entitled to common law reasonable notice of termination.
- Such notice can be provided as working notice, pay in lieu of notice or a combination of the two. Where pay in lieu is provided, the employer must “make the employee whole” for the entire reasonable notice period.
- “Making the employee whole” includes the following:
 - Value of salary.
 - Value of benefits such as, health and dental benefits, disability benefits, life insurance, pension or RRSP contributions, bonus, equity compensation and other perquisites (for example, car allowance).

Employer's liability for disability benefits

Pasap v Saskatchewan Indian Gaming Authority and Bear Claw Casino

- 2 months after the Employee's termination from employment, he suffered a serious medical event that made him disabled for the rest of his working life.
- Employee was 38 years old at the time of termination and as part of compensation package prior to termination, the group benefits insurance in which he participated included LTD benefits.
- Employer did not continue the Employee's participation in LTD coverage during the notice period.
- Court found the Employee was "totally disabled" as defined by the insurance policy and would have been entitled to LTD benefits.
- Court awarded Employee with 8 months' notice, \$25,000 in aggravated damages and \$25,000 in punitive damages.
- Court also awarded the Employee with **26 years of LTD benefits** (until the Employee turns 65), which amounted to \$1,216,764 that the Employer had to pay.

Employer's liability for disability benefits

Law in Ontario: *Brito v Canac Kitchens*

- Failing to maintain disability coverage during the reasonable notice period may make an employer liable to pay disability benefits to an employee who becomes disabled during the notice period.
- *Pasap* is consistent with Ontario case law.
- ***Brito v Canac Kitchens*:**
 - Employer terminated a 55 year old Employee with 24 years of service.
 - Within 2 weeks, the Employee found another job, which did not include STD or LTD benefits.
 - About 1.5 years later, the Employee was diagnosed with cancer and became totally disabled.
 - Employee awarded 22 months' notice.
 - Total disability took place during the notice period and Employee awarded an amount equal to the LTD benefits that he would have received from the date he became disabled until age 65 (approximately, \$200,000).

Employer's liability for disability benefits

Proactive and reactive ways to address risk

- **Enforceable termination provisions:** Enforceable termination provision should limit the continuation of benefits, including LTD benefits, to the applicable minimum employment standards legislation or some other longer period of time.
- **Prior to termination, speak with your insurer:** Not all insurance companies will continue LTD coverage for employees over the common law notice period.
 - Ideally, on termination, the package will include participation in the entirety of group benefits until the end of the notice period.
- **Get a Release:** Prepare a release that covers all claims that might possibly arise from an employee's employment and termination from employment, including any claims for loss of disability benefits.
- **Provide reasonable notice:** If there isn't an enforceable termination clause, provide common law reasonable notice and compensation in lieu of benefits coverage.
- **Look at alternatives:** Arrange for alternative disability coverage or provide compensation that would allow the employee to obtain alternative disability coverage.

Employer's liability for incentive pay

Matthews v Ocean Nutrition Canada Ltd.

- Employee participated in LTIP that had the following terms:
 - 2.01 PAYMENT OF EXECUTIVE INCENTIVE: Provided the conditions set out in Section 2.03 are satisfied on the date on which a Realization Event occurs, ONC shall pay to the Employee, in cash, less any appropriate withholding of other taxes, an amount calculated in accordance with Section 2.02, which payment shall be made within thirty (30) days of such Realization Event
 - ...
 - 2.03 CONDITIONS PRECEDENT: ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force or effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause
 - ...
 - 2.05 GENERAL: The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of the Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.

Loss of benefits after *Ocean Nutrition*

Ruel v Air Canada

- Employee sought compensation for loss of pension accrual during the notice period.
- Pension plan stated the following:
 - Employee's monthly pension benefit based on "Allowable Service," which is credited for any month during which the employee is employed and for which "Compensation" is paid.
 - "Compensation" excludes "any amounts payable subsequent to or on account of" the "Termination of Employment"
 - "Termination of employment means the cessation of Continuous Service which is not the result of as determined in Section 5 nor the result of death."
 - "Continuous Service means the period of time during which an Employee is in the Company's service beginning with the date of his last hiring and ending on the earliest of his Retirement Date, the date of his death or the date of Termination of Employment without regard to periods of temporary interruption of Membership or employment, but an Employee who terminates employment and is later re-employed by the Company shall be considered an Employee. Continuous employment has the same meaning as Continuous Service."

Employer's liability after *Ocean Nutrition*

Takeaways

- Explicit language to exclude incentive payment or payment for other benefit during the reasonable notice period in order to remove this common law right.
- In particular, language should:
 - State when an employee is entitled to the incentive payment or compensation for other benefit.
 - State there is no entitlement to incentive payment until calculated and paid.
 - Expressly remove the right to incentive payment or payment for benefit at the end of the statutory notice period.
 - State a dismissed employee cannot participate in the incentive or benefit plan during reasonable notice period.
 - Expressly state the employee is disentitled to damages for the loss of incentive pay or other benefit over the common law notice period.



Allison Buchanan

Updates on Employer Policy Requirements

New Mandatory Policies

1. Disconnect from Work Policy
2. Electronic Monitoring Policy

Disconnect from Work Policy

Amendments to the *Employment Standards Act, 2000*

Who does it apply to?

- Provincially regulated employers in Ontario with 25 or more employees on January 1, 2022

When must it be in place?

- Must be in place by June 2, 2022

What does it entail?

- Written policy
- Given to all employees within 30 days of implementation/change, or within 30 days of commencing employment

Disconnect From Work Policy

“**Disconnecting from work**” is defined under the *Employment Standards Act, 2000* as:

“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”

Does not create a new legal right for employees to disconnect from work.

ESA requirements set the minimum standards; employers can always provide a greater right.

Can have separate policies/expectations for different groups of employees.

Disconnect From Work Policy

Must include

- the date on which it was prepared
- the date any changes were made

Could include

- the employer's expectations, if any, of employees to read or reply to work-related emails or answer work-related phone calls after their shift is over;
- the employer's expectations for different situations, for example based on the time of day of the communication, the subject matter of the communication, or who is contacting the employee; and/or
- the employer's requirements for employees turning on out-of-office notifications and/or changing their voicemail messages when they are not scheduled to work.

Electronic Monitoring Policies

Amendments to the *Employment Standards Act, 2000*

- Requirement for written policy on electronic monitoring
- Employers with 25 employees or more
- Must be in place by October 11, 2022
- Given to all employees within 30 days of implementation/change, or within 30 days of commencing employment
- “**Electronic monitoring**” includes all forms of employee monitoring that is done electronically
e.g., GPS tracking of delivery vehicles, tracking of websites visited during work hours on company-issued computers, keycard/fob data to track office entry/exit times, electronic sensors to track how quickly items are scanned at a grocery store check-out

Electronic Monitoring Policies

Substantive requirements

Substance

- Information regarding whether the employer electronically monitors its employees;
- If so, a description of how such monitoring is performed, and under what circumstances; and
- The purpose of collecting information through such electronic monitoring.

Must also be...

- Dated, including dates of any amendments
- Provided to all employees

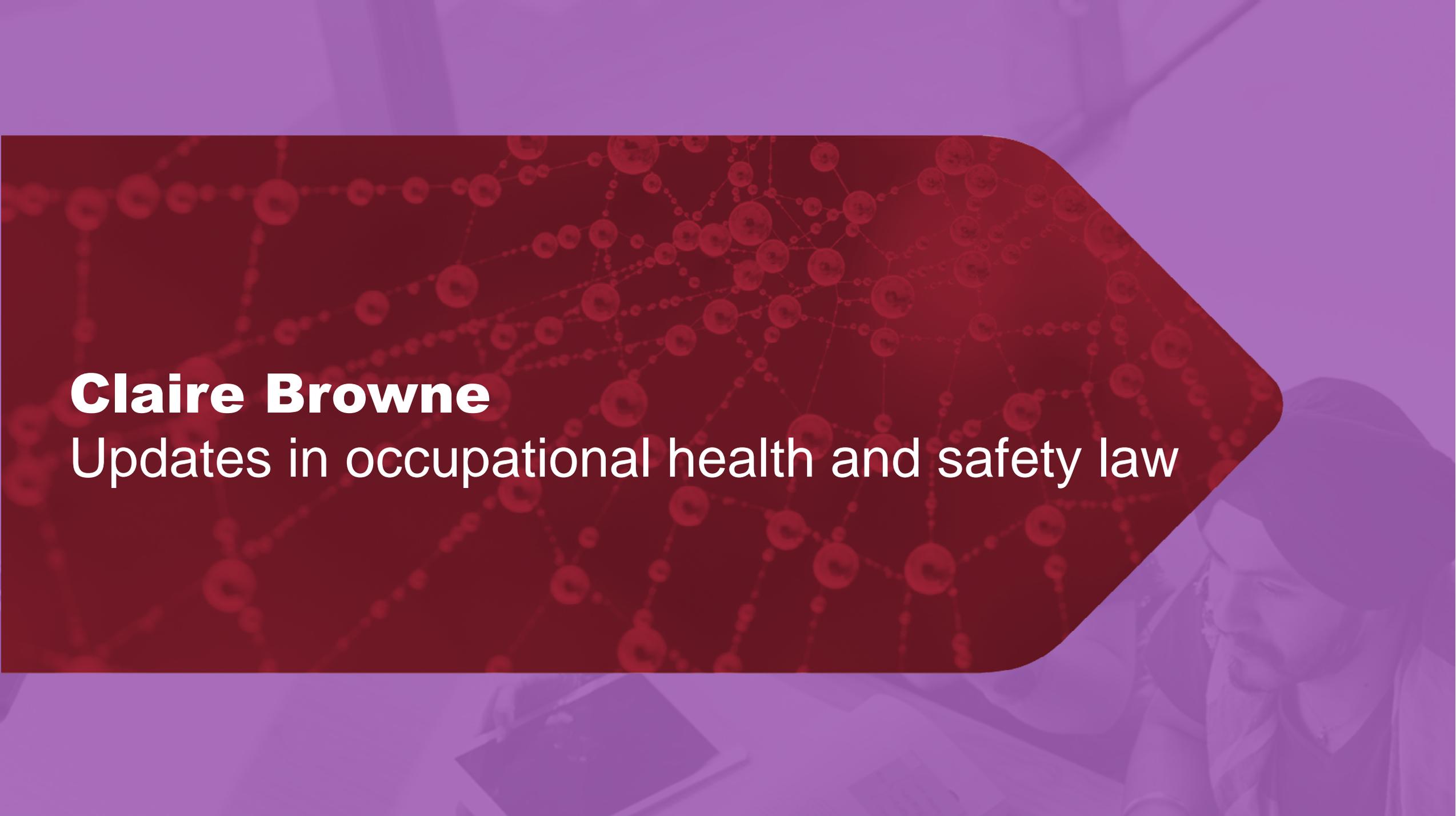
Electronic monitoring is NOT limited to....

What is required to be captured in the employer's policy is not limited to:

- devices or other electronic equipment issued by the employer
- electronic monitoring that happens while employees are at the workplace

Real transparency is important!

- Ontario government's stated objective
- Limits on complaints to the Ministry of Labour



Claire Browne

Updates in occupational health and safety law

Changes to *Occupational Health and Safety Act*

- Increase to maximum fines for directors and officers of a corporation
 - From \$100,000 CAD to **\$1.5 million CAD**
- Increase to maximum fines for other individuals
 - From \$100,000 CAD to **\$500,000 CAD**
- Introduces list of “aggravating factors” to be considered when determining a monetary penalty
- Extends the limitation period under the *Act* for initiating a prosecution from one to two years

Ontario (Labour) v Sudbury (City)

2021 ONCA 252 (leave to appeal to SCC granted)

- Struck-by incident involving a road grader performing repairs at an intersection.
- City of Sudbury contracted with employer of road grader to complete the road repairs.
- Ontario Court of Appeal considered whether the City of Sudbury was an “employer”
- Key findings:
 - *Occupational Health and Safety Act* contemplates the possibility of multiple employers.
 - Entity may meet the definition of several workplace parties under the *Occupational Health and Safety Act*.
 - City of Sudbury was an “employer” - employed one or more workers at the project site.

Ontario (Labour) v Great Lakes Food Company

2022 ONCJ 447

- Worker went overboard off of a ship owned and operated by employer.
- Ontario Court of Justice considered whether employer failed to ensure **every precaution reasonable** in the circumstances was taken for the protection of a worker.
 - Suitable cold water protective equipment was provided and used.
- Following accident, employer purchased floater coats and requires workers onboard to wear while working.
- Key Findings:
 - Crown must provide the precautions alleged were reasonable in light of the circumstances.
 - Employer cannot be held liable for an event that was unforeseeable.
 - Post-accident conduct cannot be relied upon as evidence of the *actus reus* of the offence.

Thank you



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