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Day 1

Wednesday, October 12, 2022

**ONTARIO EMPLOYMENT AND
LABOUR FALL WEBINAR SERIES**

OCTOBER 12-14, 2022

Presenters



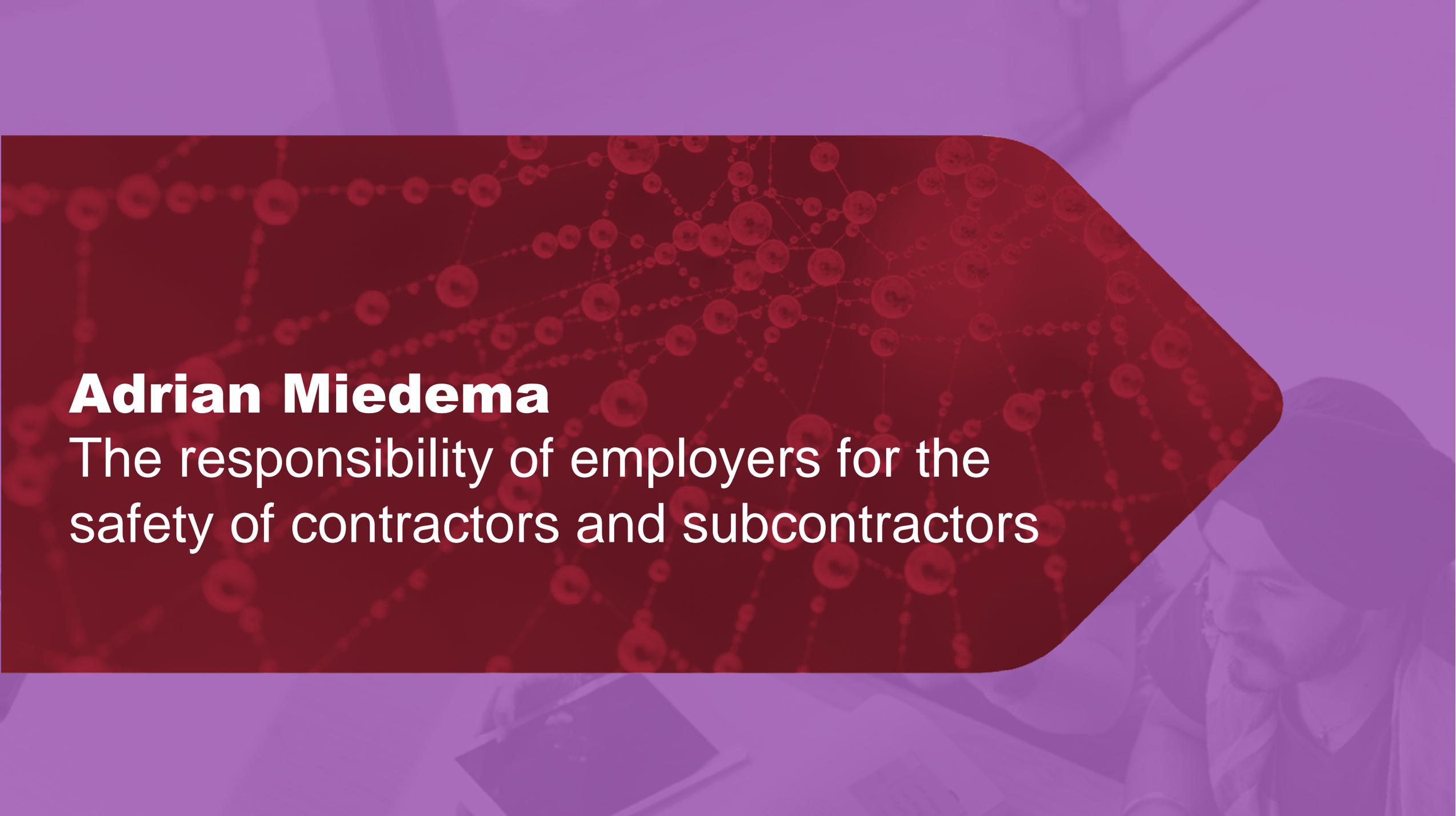
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Adrian Miedema

The responsibility of employers for the
safety of contractors and subcontractors

Who is an “employer”?

s.1(1) of the *Occupational Health and Safety Act*

- “Employer” means:
 - Person who employs one or more workers or contracts for the services of one or more workers.
 - Includes:
 - Contractor or subcontractor who performs work or supplies services; and
 - A contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

Duties of an “employer”

s.25 of the *Occupational Health and Safety Act*

- Broad range
- Includes:
 - Duty to ensure the measures and procedures prescribed are carried out in the workplace.
 - Duty to provide “**information, instruction and supervision**” to a worker to protect the health or safety of the worker.
 - Duty to take “**every precaution reasonable**” in the circumstances for the protection of a worker.

R v Wyssen

1992 CanLII 7598

- Window cleaner contracted with experienced window cleaner to clean windows of high-rise condominium building.
- Ontario Court of Appeal concluded *Occupational Health and Safety Act* applied to employer of independent contractor
- Employer's duty cannot be evaded by contracting out performance of work to independent contractors.

R v Enbridge Gas Distribution Inc.

2010 ONSC 2013 (leave to appeal to ONCA refused, 2011 ONCA 13)

- Explosion and post-blast fire at two-storey commercial plaza.
- Enbridge contracted with Precision Utility Limited to locate (and mark) underground pipeline.
- Ontario Superior Court of Justice determined that Enbridge and Precision Utility Limited were “employers”
- Key Findings:
 - Overlapping responsibilities under *Occupational Health and Safety Act*.
 - Employers working around same project have responsibility to ensure safety of own employees **and** others on project.

Ontario (Labour) v Sudbury (City)

2021 ONCA 252

- 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 determined the City of Sudbury was an “employer”
- Key findings:
 - *Occupational Health and Safety Act* contemplates the possibility of multiple employers in a workplace.
 - Entity may meet the definition of several workplace parties under the *Occupational Health and Safety Act*.
 - City of Sudbury employed one or more workers at the project site.

Ontario (Labour) v London (City)

- Struck-by incident involving freight train and worker operating Bobcat to clear snow from railways tracks.
- City of London contracted with J. Jackson Pools Inc. for winter sidewalk maintenance which subcontracted to Weebee Contracting (employer of deceased worker) to provide labourers to assist with snow removal.
- Ontario Court of Justice determined:
 - City of London was an “employer” of deceased worker.
 - City of London failed to take “every precaution reasonable in the circumstances” for the protection of a worker.

Recommendations for employers

- Employers have duties relating to safety of contractors, and possibly employees of other employers who are on site.
- Key duty: ensure workers have sufficient training.
- Consider:
 - Site orientation
 - Work plan
 - Proof of training
 - Independent inspections
 - Reviewing contractors' health and safety training program



Meaghen Russell

Best practices for ending
the employment relationship

Best practices

Type of termination

Resignation

- Notice of resignation, acceptance

For Cause

- High onus
- Ontario: difference between “just cause” at common law and terminating without notice/severance under the ESA.

Without Cause (non-unionized employees)

- What is the employee owed as a result of the employment relationship ending?
 - Contractual/statutory/common law entitlements
 - Enforceable termination language?
- Federally regulated employers: no ability to terminate “without cause” if the employee has more than 12 months of service and is not managerial/supervisory (unjust dismissal).

Best practices

Preparation

- Written notice of termination (i.e. Ontario ESA s. 54(a))
 - Immediate termination or working notice
- Consider additional offer in exchange for a full and final release.
- Termination meeting script
 - Get to the point
- Plan for disabling access to Company systems/files/emails.
- Prepare employee's "Out of Office" message.
- Consider employee's potential involvement with communicating the exit.

Best practices

Conducting the meeting

- Individuals present at meeting
- Timing of meeting
- Location of meeting
 - Virtual?
 - In-person?
- Reason for termination
- Obtaining personal email address

Best practices

Additional considerations

- Collecting personal belongings
- Return of Company property
- Available resources
 - EAP
 - Outplacement?
- Record of Employment
- Reference letter/confirmation of employment letter
- Timing for statutory payments post-termination
 - Ontario: ESA s. 11(5)



Emily Kroboth

Best practices for workplace investigations

An employer's obligations

- Regardless of jurisdiction, human rights laws and occupational health and safety legislation requires employers to prevent harassment and discrimination, and investigate associated allegations.
- The need for a workplace investigation arises upon the occurrence of a “triggering event”
- What is a triggering event?
 - A formal, informal, or anonymous complaint
 - The observation of discrimination or harassment
 - Breach of a workplace policy

Best practice #1: Follow your policies & procedures

- Many jurisdictions (including Ontario) require employers to have a **Workplace Harassment & Violence Policy** in place, outlining the procedure to be followed in the event of a complaint of workplace harassment or violence.
- The process & procedure outlined in your Policy should be followed over the course of the investigation.
- A Workplace Harassment & Violence Policy should include information, such as measures or procedures to report incidents in various situations, how complaints will be dealt with, how identifying information will be guarded during the investigation, and how parties will be informed of the results of the investigation.

Best practice #2: Select an appropriate investigator

- An investigator should be:
 - Neutral
 - Unbiased
 - Trained
 - Knowledgeable
- In some cases, an employer should consider engaging a third-party investigator, when the issues at hand are:
 - Complex
 - High-risk
 - Sensitive
 - Likely to be scrutinized by a court or the media

Best practice #3: ensure the investigation is timely (but don't rush)

- Following a “trigger event”, employers should ensure that an investigation is conducted promptly.
- Typically, “promptly” means within 90 days of the “trigger event”.
- However, once an investigation has begun, an investigator should not rush through it, and ensure:
 - The Complainant, Respondent, and each Witness is interviewed;
 - All relevant evidence is gathered and considered; and
 - Conclusions are drawn based evidence and credibility of the witnesses.
- Once an investigation report is produced, employers should carefully consider (and not rush to conclusions regarding):
 - Corrective action (if required);
 - Any necessary re-training or coaching; and
 - Any progressive discipline.

Best practice #4: Ensure the investigation is “fair”

- An investigation must be fair to both the Complainant and the Respondent
- Complaints should be taken seriously
- Respondents should have a meaningful opportunity to respond to any allegations against them
 - i.e. they should be provided with the specific allegations against them
- Investigations should not be a “fishing expedition”

Best practice #5: Document every step of the process

- Investigators should ensure to retain/document the following:
 - Complainant/Respondent/Witness interviews;
 - Any notes taken during the course of the investigation;
 - Any admissions to the allegations;
 - Any documentary evidence;
 - Any communications with the Complainant, Respondent, or Witnesses; and
 - The final investigation report.

Best practice #6: Keep it confidential

- Complainants, respondents and witnesses should be advised that the investigation process is confidential.
- Information should be shared on a “need to know” basis.
- Complainants, respondents and witnesses should be reminded that they should not attempt to influence what another person tells the investigator.
- Gossip, rumours and reputational concerns can all impact the integrity of an investigation.
- Consider the use of confidentiality agreements throughout an investigation.

Best practice #7: Check bias at the door

- An investigator must:
 - Begin the investigation process with an open mind;
 - Consider all information provided by the Complainant, Respondent and Witnesses;
 - Discard preconceived notions about the involved parties;
 - Conduct an investigation that is devoid of myths or stereotypes.
- An investigator should also consider whether a Witness may be biased.

How not to conduct an investigation – *McGraw v Southgate Township*

- The Plaintiff was an administrative assistant and volunteer fire captain with the Dundalk Fire Department, which fell under the jurisdiction of Southgate Township.
- The Township terminated the Plaintiff's employment without cause. Although the Township terminated the Plaintiff's employment without cause, the termination was the culmination of years of workplace gossip, accusations of inappropriate behaviour and morale issues allegedly stemming from the Plaintiff's behaviour.
- The Plaintiff brought a claim for failure to provide reasonable notice, moral damages, damages under Human Rights Code, damages for defamation, and punitive damages.

How not to conduct an investigation – *McGraw v Southgate Township*

- The Plaintiff was the subject of a number of rumours and accusations, largely based on hearsay and perpetuated by her colleagues and others in the small community in which she worked.
- At trial, the Court characterized the Township's defence as follows:

“We did not act with malice or in bad faith or discriminate against [the Plaintiff]. We fired her because she was the object of rumours that we believed were true. We could not prove they were true, so we fired her on a without cause basis and paid severance. The pervasive nature of the rumours shows that we did not act with malice, bad faith, or discrimination.”

- The Court found that the investigation conducted in this case was “completely inadequate”.

How not to conduct an investigation – *McGraw v Southgate Township*

- The Court awarded extensive damages:
 - a) **Six months** reasonable notice damages based on the standard Bardal factors;
 - b) Moral damages in the amount of **\$75,000** due to the “exceptional” unfairness of the defendant’s investigation, which “conflated gossip with facts”;
 - c) **\$35,000** in damages for gender-based discrimination, as the termination was founded on sexist allegations and the Plaintiff was subject to “a toxic, male-dominated workplace”;
 - d) **\$20,000** in damages for defamation, as a witness for the defendant admitted on the stand that he fabricated the “sex for grades” comment, a comment which the Court found to be both “appalling” and discriminatory; and
 - e) **\$60,000** in punitive damages because the defendant’s treatment of the plaintiff was “reprehensible and was a serious departure from ordinary standards,” which called to a mind “a different era.”

Dentons Workplace Investigations Group

- We provide employers with the following services:
 - External workplace investigations;
 - Investigative support for internal investigations;
 - Workplace policy audits;
 - Workplace investigation training; and
 - Respectful workplace training.

Thank you



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