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# Day 3

Friday, October 14, 2022

**ONTARIO EMPLOYMENT AND  
LABOUR FALL WEBINAR SERIES**

OCTOBER 12-14, 2022

# Presenters



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**Matthew Curtis**

Employee/contractor misclassification

# Agenda

- Independent Contractor vs. Employee vs. Dependent Contractor – what do they each mean?
- Case law update – determining which category a worker falls into
- Best practices and key takeaways

# Independent contractor

- Self-employed and provides services to customers through their own business.
- Generally not limited to services for one company and can hire others to perform services.
- Control who they work for, how and when they work.
- Provide their own tools and equipment, typically set their own hours of work subject to meeting project requirements.
- Paid by daily/weekly/monthly billing fee rate.
- Ineligible for employee group benefits.
- Written contract indicating clear independent contractor relationship.

# Independent contractor

- Independent contractors are not covered by employment legislation.
- No entitlement to reasonable notice of termination – notice of termination of contract is dictated by the terms of the contract.
- Independent contractors are responsible for their own tax remittances and are not subject to normal payroll deductions.
- No payment of benefits, such as health/dental/disability insurance: worker must purchase them.

# Employee

- Employees work as part of their employer's business.
  - They must follow employer's instructions on how and when to work.
  - Worker works exclusively for one company and has a duty of loyalty.
  - Employer provides worker with most of the tools and equipment.
- Employees are covered by the minimum standards under the applicable employment legislation (e.g. the *Employment Standards Act, 2000*).
  - E.g. minimum wage, hours of work, overtime pay, termination notice etc.

# Employee

- Employees are entitled to reasonable notice of termination (absent enforceable limiting termination language in an employment contract).
- Employers make deductions from employees' pay e.g. income tax, CPP and EI.
- In most cases, employers contribute to group benefits (Health/dental/disability insurance/RRSP).
- Employees also have the right to unionize.

# Dependent contractor

- Intermediate status between employee and independent contractor.
- Individual is technically self-employed, but there is a recognition that the contractor is economically dependent on a single work provider.
- **A finding that an individual is really a dependent contractor has significant impact:**
  - Individual will now be entitled to common law reasonable notice of termination.
  - Individual will be covered by labour legislation, meaning they are entitled to unionize.
  - This occurs often in the construction industry where unions will argue that workers are really dependent contractors and should be a part of the bargaining unit.
- Finding does not result in the individual being covered by employment legislation or being subject to payroll deductions.

# Why do the classifications matter?

- A business might prefer to use an independent contractor because they are potentially:
  - **Cheaper:** no minimum wage, overtime pay, etc. No CPP, EI or workers' compensation contributions. No entitlement to common law reasonable notice upon termination.
  - **More flexible:** no maximum hours of work, less supervision, easier to terminate etc.

# Why do the classifications matter?

- Misclassification can have significant consequences:
  - Liability for unpaid wages, overtime pay, vacation pay, holiday pay or termination pay.
  - Liability for unpaid income tax, CPP/EI contributions or workers' compensation premiums.
  - A claim for wrongful dismissal damages following termination of employment.
  - A unionization campaign.
  - Misclassification of an entire class of employees or an entire workforce could result in a class action lawsuit.

# Case law update

Legal assessment on employment/contractor status

# ***Thurston v Ontario (Children's Lawyer), 2019 ONCA***

- The Appellant, Barbara Thurston, worked for the Office of the Children's Lawyer (OCL) for 13 years through a series of fixed-term contracts.
- Over the 13 year period, the OCL work accounted for an average of 39.9% of her annual billings.
- Following the OCL's notice that they would not be renewing Ms. Thurston's contract, Ms. Thurston brought a claim for wrongful dismissal and damages for reasonable notice of termination.
- Motion Judge Held:
  - The fact that the relationship was continuous for 13 years without a break, coupled with the fact that an average of 39.9% of Mr. Thurston's billings came from OCL, was sufficient to "tip the balance" in favour of finding that Ms. Thurston was a dependent contractor.

# ***Thurston v Ontario (Children's Lawyer), 2019 ONCA***

## **On appeal to the Ontario Court of Appeal:**

- Dependent contractor status is a non-employment relationship in which there is “a certain economic dependency, which may be demonstrated by a complete or near-complete exclusivity.”
- Near-complete exclusivity cannot be reduced to a specific number that determines dependent contractor status; additional factors may be relevant in determining economic dependency, but near-exclusivity necessarily requires substantially more than 50% of income.
- 39.9% of billings cannot be said to constitute exclusivity or near-exclusivity. Therefore Ms. Thurston was not a dependent contractor.

## **Consideration of other relevant factors:**

- Contract contemplated that Ms. Thurston could continue her private practice and confirmed that she did not work exclusively for OCL (no guarantee of work or number of files).
- OCL reserved the right to terminate the agreement at any time.
- Ms. Thurston had her own office, supplies, and staff.
- Ms. Thurston's private practice constituted the main source of her total income.

# *Scamurra v Scamurra Contracting, 2022 ONSC 4222*

- The applicant was wrongfully dismissed from a family business and claimed that he was an employee entitled to reasonable notice.
- The respondents focused on the fact that the employee was paid through a numbered corporation and had a high degree of autonomy.
- **The Court considered the following factors:**
  - Company provided Scamurra with all his tools and equipment.
  - Worker hired people on behalf of the company.
  - Worker was not given the opportunity to participate in the profits of the Company (paid bi-weekly).
  - While he had a significant amount of independence, he ultimately reported to his uncle.
  - Although he was paid through a numbered company, it was for the purpose of defeating spousal support claims.

## **Held:**

- Given the totality of circumstances, the Court indicated that being paid through a numbered company was not fatal to his claim, and determined that Scamurra was an employee who was entitled to reasonable notice of termination.

# The test for classification

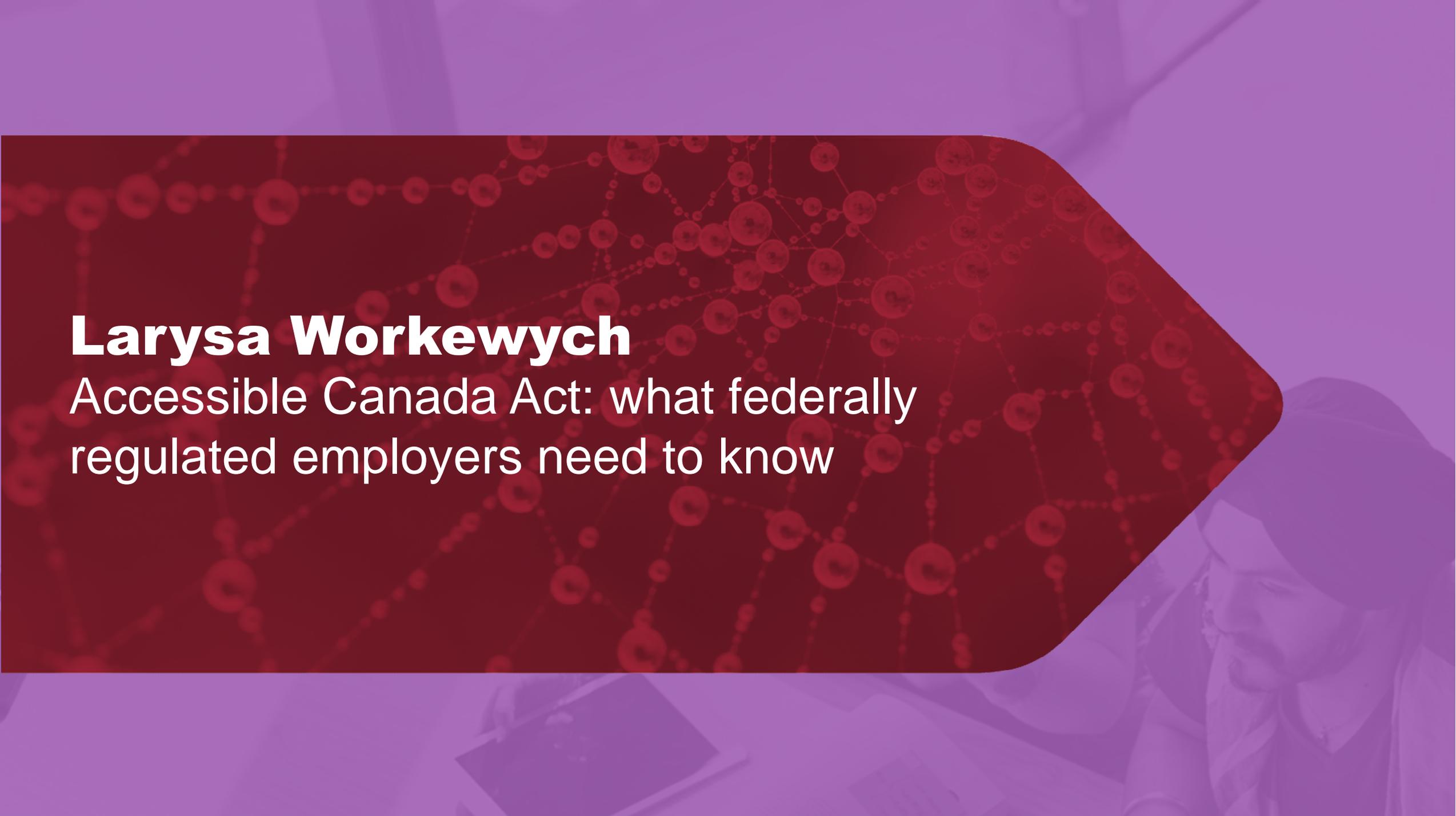
- There is no single test and different decision making bodies (i.e. Court versus Ontario Labour Relations Board) will rely on slightly different formulations, however, common factors include:
  - Control
  - Ownership of tools
  - Opportunity for profit or loss
  - Exclusivity
  - Integration
  - Intentions of the parties

# Best practices and key takeaways

- Do not rely on generalizations or labels to determine worker classification.
- Avoid engaging former or current employees to perform their old duties as an independent contractor.
- Draft an appropriate independent contractor agreement.
- Consider the positions and ensure it's suited to an independent contractor relationship:
  - Duration of contract
  - Scope
  - Control
  - Helpers
  - Tools
  - Profit or loss
- Require documents from worker demonstrating proof of insurance, GST/HST number, etc.

# Best practices and takeaways

- Pay the contractor on a project or flat fee basis, not through company payroll.
- Require invoices and a HST number.
- Do not attempt to control the details of how the worker performs the work.
- Do not give the contractor a company job title.
- Deal with performance problems as contract modification or breach issues, not as disciplinary issues.

A woman wearing a purple hijab is looking at a laptop screen. The background is a light purple color with a faint network of red circles and lines. A dark red arrow-shaped graphic points from the left towards the right, containing the text.

## **Larysa Workewych**

Accessible Canada Act: what federally regulated employers need to know

# What is the *Accessible Canada Act*?

- Came into force July 11, 2019
- Purpose of the *Accessible Canada Act* is to make Canada “barrier-free” by January 1, 2040
- Priority areas:
  - Employment
  - Built environment
  - Information and communication technologies
  - Communication
  - Procurement of goods, services and facilities
  - Design and delivery of programs and services
  - Transportation

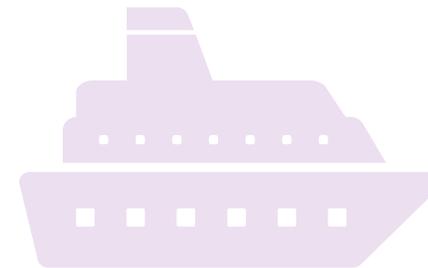
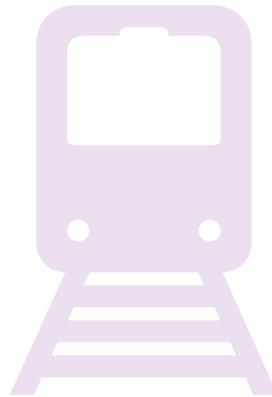


# Seven principles

1. All persons must be treated with dignity regardless of their disabilities
2. All persons must have the same opportunity to make for themselves the lives that they are able and wish to have regardless of their disabilities
3. All persons must have barrier-free access to full and equal participation in society, regardless of their disabilities
4. All persons must have meaningful opinions and be free to make their own choices, with support if they desire, regardless of their disabilities
5. Laws, policies, programs, services and structures must take into account the disability of persons, the different ways that persons interact with their environments and the multiple and intersecting forms of marginalization and discrimination faced by persons
6. Persons with disabilities must be involved in the full development and design of laws, policies, programs, services and structures
7. The development and revision of accessibility standards and the making of regulations must be done with the objective of achieving the highest level of accessibility for persons with disabilities

# Act applies to...

- Government of Canada
  - Includes governmental departments, agencies and Crown corporations
- Federally regulated private sector entities
  - Banks
  - Federal transportation network (airlines, rail, road, and marine transportation providers)
  - Broadcasting and telecommunications sectors
- Canadian Forces
- Royal Canadian Mounted Police
- Parliamentary entities



# What does the *Act* require?

- Prepare and publish accessibility plans that show how they identify, remove and prevent barriers.
  - Update and publish plans every 3 years
  - Consult with persons with disabilities in preparing and updating plans
  - If requested, alternate formats of plans must be provided
- Establish a feedback process for receiving feedback about accessibility plan and barriers encountered by persons dealing with entity.
- Prepare and publish progress reports related to implementation of accessibility plan.
  - Show how feedback received was considered
  - Consult with persons with disabilities in preparing progress reports
  - Describe how consultation occurred in preparing progress reports

# Timelines for publishing initial accessibility plan

**December 31, 2022**

Government of Canada  
departments, agencies,  
Crown corporations,  
Parliamentary entities, the  
Canadian Forces, the RCMP

**June 1, 2023**

Private sector entities with  
100 or more employees

**June 1, 2024**

Private sector entities with  
10 to 99 employees



# ***The Accessible Canada Regulations***

- Came into force December 31, 2021
- Prescribe deadlines for publishing initial accessibility plans
- Describe what must be included in an accessibility plan
  - Prescribed headings and information
- More detail about requirements from the *Accessible Canada Act*, including
  - Feedback process
  - Progress reports
  - Publishing of documents
  - Alternate formats
  - Document retention requirements



**Russell Groves**

Employment contract termination  
provision tune up

# Agenda

1. The Importance Of Employment Contracts and Contractual Termination Language
2. Things Fall Apart – The Assault On Contractual Termination Language
3. Termination Language Issue Spotting

**Total Time: 15 min**

# Overview of employment contracts and termination language

- What are the primary sources of rights and obligations in an employment relationship?
- Is a written contract required for an employment relationship?
- How are contractual rights determined in the absence of a written agreement?

# Overview of employment contracts and termination language

- Minimum employment standards statutes create a floor that parties cannot contract below.
- Section 5(a) of the ESA:
  - “...no employer... shall contract out of or waive an employment standard, and any such contracting out or waiver is void”
- Section 60(1) of the ESA:
  - “During a notice period under section 57 or 58, the employer, (a) shall not reduce the employee’s wage rate or alter any other term or condition of employment”

# Things fall apart - The assault on contractual termination language

- For the past decade contractual termination provisions have been under attack by employee-side counsel.
- Courts at all levels in Ontario are consistently finding against employers on these issues.
- It is likely only a matter of time before this trend extends to other jurisdictions.

# Things fall apart – Benefit continuation

- *Wright v. The Young and Rubicam Group of Companies* (2011)
  - Termination clause failed to expressly set-out benefit continuation during statutory notice period.
  - Termination provision was still struck by the Court even though the employer continued benefits during the statutory notice period.

# Things fall apart – Severance pay

- *Wood v. Fred Deeley Imports Ltd. (2017)*
  - “[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph. . .”

# Things fall apart – No ceiling

- *Nemeth v. Hatch Ltd. (2018)*
  - Termination provision failed to indicate that the employee would be entitled to **only** their statutory minimums at the time of termination.
  - Clear and unambiguous language is required to convert “the statutory floor into a ceiling”.

# Things fall apart – Just cause

- *Waksdale v Swegon North America Inc.* (2020)
  - The employee had been dismissed without cause.
  - Read alone, the without cause language was enforceable, but the with cause language was broader than provided for by statute.
  - The enforceability of both with and without cause provisions was found to be connected.

# Issue spotting

## Example #1:

“The Company may terminate your employment at any time for just cause which includes wilful misconduct and breach of Company policy.”

Enforceable or Unenforceable?

# Issue spotting

## Example #1:

“The Company may terminate your employment at any time for just cause which includes wilful misconduct and breach of Company policy.”

**Unenforceable** – Definition of “just cause” goes beyond “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned”.

# Issue spotting

## Example #2:

“The Company may terminate your employment without cause at any time by providing you with the minimum notice required by statute.”

Enforceable or Unenforceable?

# Issue spotting

## Example #2:

“The Company may terminate your employment without cause at any time by providing you with the minimum notice required by statute.”

**Unenforceable** – Termination at “any time”, failure to include other entitlements beyond statutory notice, failure to indicate “only”, failure to identify the statute, failure to set out benefit continuation, etc.

# Issue spotting

## Example #3:

“The Company may terminate the employment relationship without cause by providing you with the notice or pay in lieu of notice; severance pay; benefit continuation; and vacation pay required by the Ontario *Employment Standards Act, 2000*.”

Enforceable or Unenforceable?

# Issue spotting

## Example #3:

“The Company may terminate the employment relationship without cause by providing you with the notice or pay in lieu of notice; severance pay; benefit continuation; and vacation pay required by the Ontario *Employment Standards Act, 2000*.”

**Trick Question!** The provision is enforceable but does not prevent a claim for common law notice.

# Conclusion

- **The bad news:** The law is not employer friendly and getting worse.
- **The good news:** We can make it better than it was. Better, stronger.... without costing Six Million Dollars!
- **The best practice:** Review employment contract templates annually -an ounce of prevention is worth a pound of cure.

# Conclusion

- **Dentons Canada Termination Toolkit**
  - Write to either myself or your usual contact for a copy of this toolkit which will help identify issues.

# Thank you



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