



大成 DENTONS

Day 2

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DENTONS' EMPLOYMENT AND LABOUR FALL WEBINAR SERIES

EMERGING WORKPLACE AND HUMAN RESOURCES ISSUES

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Complying with overtime laws



- Kyle Isherwood, Senior Associate, Toronto

Overtime – The basics

- Every province has overtime legislation
- Stipulates a number of hours either daily or weekly
- If employees exceed those hours you have to pay overtime pay
- Ontario is 44 hours in a week
 - Overtime Pay is 1.5x the “regular rate”

Hours of work

- All hours worked by the Employee
- Some Provinces have different rules for what is included in Hours of Work
- In Ontario, premium pay hours for working a public holiday are NOT considered in calculating overtime pay.

Overtime pay

- What is the “regular rate”?
 - Hourly employees:
 - the amount earned for an hour, not counting overtime
 - Everyone else:
 - The amount earned in a given work week divided by the number of non-overtime hours worked

Time off in lieu

- Instead of overtime pay, can give time off in lieu
- Rate of 1.5 hours off for every hour worked
- Must have an agreement with the employee AND time off must be within 3 months of the work week
- If employee further agrees then it can be within 12 months of the work week.

Averaging agreements

- Can average time over a longer period to avoid overtime pay
- Can be averaged over 2 to 4 weeks
- Must be an agreement with the Employee
- Averaging periods cannot overlap
- Cannot extend for more than 2 years

Record keeping

- Must track hours worked
- Must show the number of hours worked in each day and each week
- Including dates and times that the employee worked in excess of the overtime threshold
- Difficult to dispute claims without this information

Exemptions

- Exemption from the Record Keeping obligations if salaried AND:
 - Record hours in excess of regular workweek AND
 - number in excess of 8 each day OR if employee regularly works more than 8, the number in excess of their regular hours
- OR
- Are otherwise exempt from Overtime Pay

Exemptions – continued

- Salaried employees are **NOT** overtime exempt
- Managers/Supervisors
 - Supervision generally is employees not machines
 - Managerial is distinct from supervisory and can be managerial without supervising employees
 - Hiring and firing
 - Responsibility for substantial purchases
 - Financial control/budgeting
 - Production planning
 - Regular exercise of discretion and independent judgment in management affairs
 - Titles are not determinative!
 - Can perform irregular non-supervisory/managerial duties

Exemptions – continued

- Information Technology Professionals
 - Only for employees who use specialized knowledge and professional judgment
 - E.g. development of Company software or maintenance of software/hardware products
 - Does NOT include employees
 - trouble-shooting computers sold by the employer
 - using hardware and software products
 - Performing routine tasks involving information technology
- Numerous professionals are exempt from overtime
- Every Province has exemptions, but the exact nature and impact of the exemptions varies

Managing overtime liabilities

- Have clear policies requiring managerial approval of overtime
- Have employees submit timesheets of their hours
- Monitor after-hours emails and phone calls. Be aware of trends.
- Use averaging agreements and time in lieu where appropriate
- New legislation on the Right to Disconnect

COVID-19 health & safety update



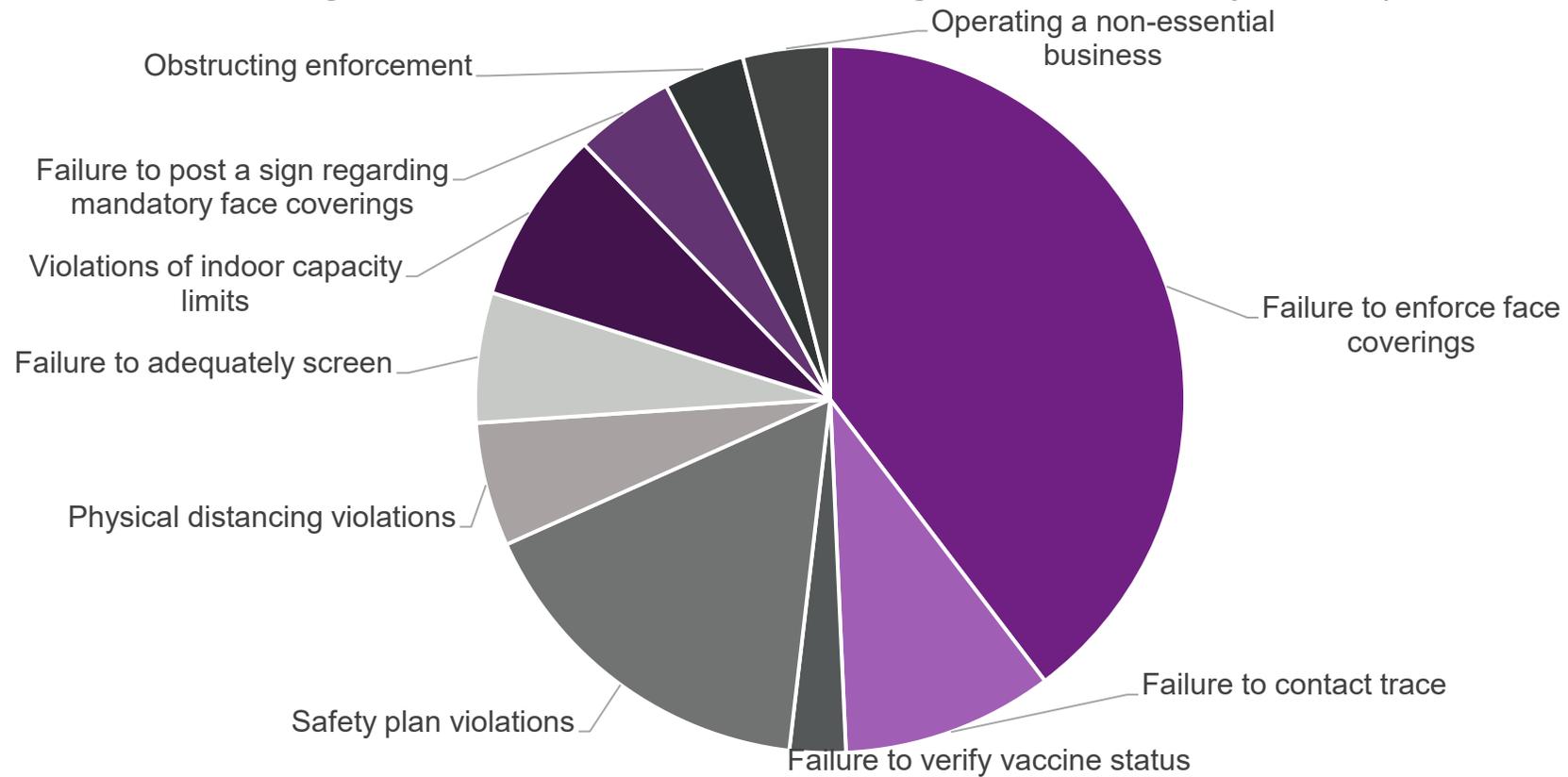
- Adrian Miedema, Partner, Toronto
- Emily Kroboth, Associate, Toronto

Workplace safety requirements

- Regulation 364/20 (Step 3 and Roadmap):
 - Active screening (screening tool), masking and social distancing
 - Work from home?
 - Follow public health recommendations
- March 2022 aspirational end date

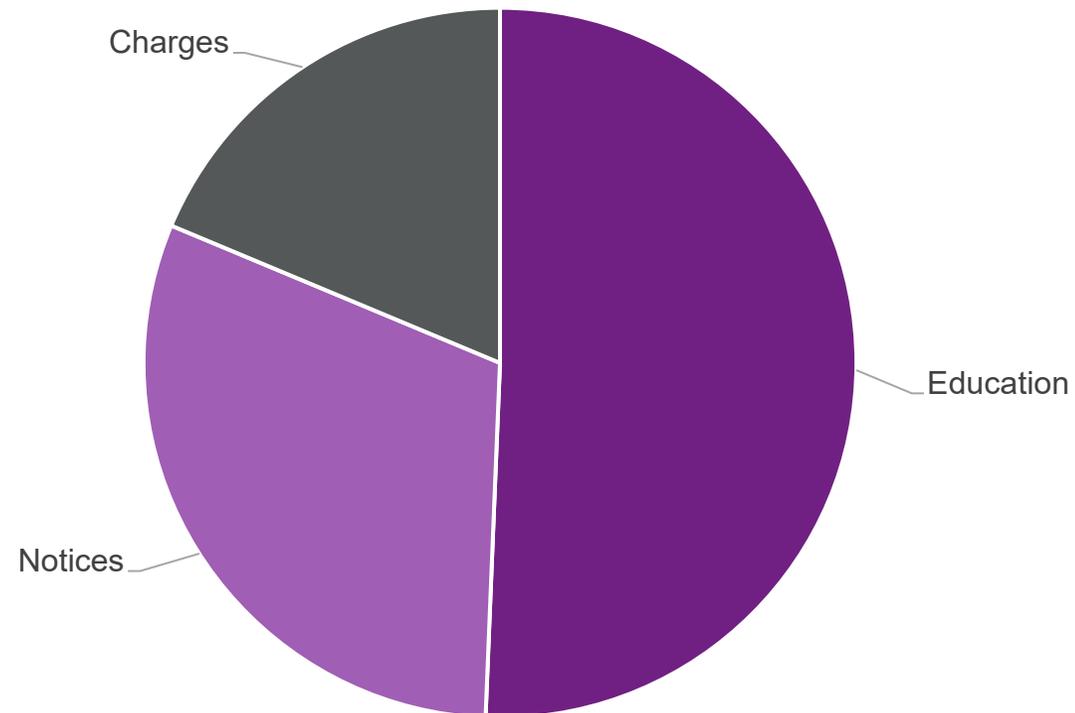
Charges and fines (Hamilton)

Business charges issued under COVID Regulations and By-laws (Hamilton)



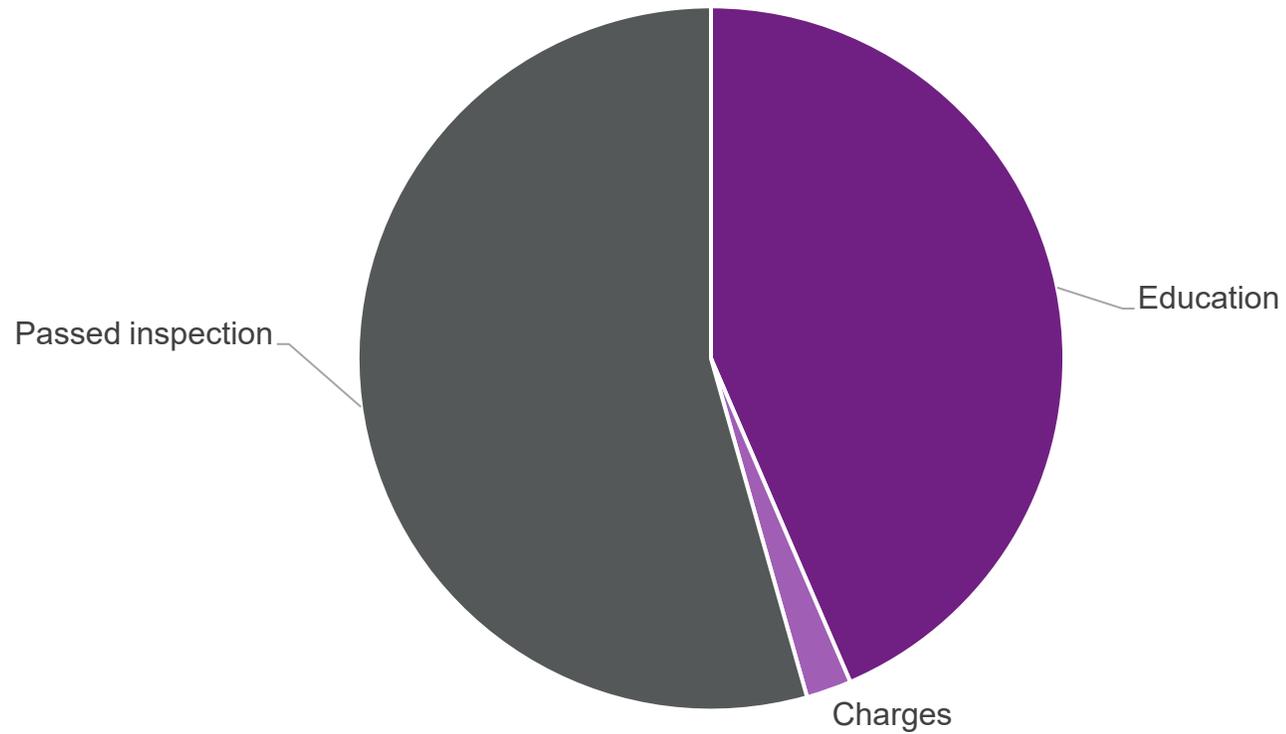
Charges and fines (Toronto)

Provincial orders on business operations in Toronto



Charges and fines (York Region)

Provincial orders on business operations in York Region



Expected workplace safety issues

- Vaccination policies
 - Religious exemptions
 - Rapid tests
- Labour shortages, overwork, safety
- Informed, assertive employees
- Harassment issues, anxiety
- More frequent MOL inspections
- Pandemic-related OHS/A charges

Case law update: Workplace Safety and Insurance Act



- Claire Browne, Associate, Toronto

Workplace Safety and Insurance Act, 1997

- Governs compensation and benefits available to Ontario workers who are injured in the course of their employment
- Workers are entitled to benefits under the insurance plan where:
 - 1) Worker sustains a personal injury;
 - 2) By accident;
 - 3) Arising out of and in the course of their employment.
- Workplace Safety and Insurance Board (“WSIB”) adjudicates claims
- Workplace Safety and Insurance Act Tribunal (“WSIAT”) hears appeals from final decisions of the WSIB
- Employer, from whom statutory accident benefits are claimed, may apply to the WSIAT to determine whether an employee’s right to commence an action is taken away (by application of the *Act*)

“Historic Trade-Off” under the *Act*

- Workers receive insurance benefits if they establish that their injury or disease is work related
- Workers are not required to prove that their employer was “at fault” for their injury or disease
- Employers pay into the accident insurance fund
- Employers are protected against civil litigation proceedings for work-related injuries

Morningstar v WSIAT, 2021 ONSC 5576

- Applicant employee filed a civil suit against employer for:
 - Constructive dismissal
 - Breaches of the *Occupational Health and Safety Act* and *Employment Standards Act, 2000*
 - Tort of harassment and/or poisoned work environment
- Employer applied to the WSIAT to bar the applicant employee from bringing any of their civil claims against the employer
- **WSIAT**
 - Barred all of the applicant employee's claims, including the claim for constructive dismissal
 - Held: Applicant's claim of constructive dismissal constituted an exceptional circumstance where a wrongful dismissal action was statute-barred by application of the *Workplace Safety and Insurance Act, 1997*
- **Reconsideration Decision**
 - WSIAT denied the applicant employee's request for reconsideration

Morningstar v WSIAT, 2021 ONSC 5576

- **Divisional Court**

- Quashed the portions of WSIAT decisions that barred the applicant's constructive dismissal claim
- WSIAT applied the "inextricably linked" test in a manner that ignored the policy and wording behind the legislation
- WSIAT focused on the linkage of the facts to the accident in question as opposed to the *bona fides* of a cause of action for constructive dismissal or the availability of benefits under the *Act*
- "Historic trade-off" prevents workers from suing in tort
- However, case law recognizes, generally, wrongful dismissal actions will not be barred under the *Act*
- WSIAT has barred actions where the cause of action appears to be a "disguised WSIB claim"

What does this mean for employers?

- The right to bring a constructive dismissal action may be not be prohibited by application of the *Act*
- WSIAT will consider:
 - The substance of “right to sue” applications (including damages sought)
 - Whether the claim is an attempt to “skirt” the limitations of the *Act*

Thank you



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