

Human rights update, vacation refresher and best practices in hiring and onboarding

WEBINAR SERIES

LEGAL UPDATES

FOR CANADIAN EMPLOYERS

Moderator



Adrian Miedema
Partner
D +1 416 863 4678
adrian.miedema@dentons.com

Presenters



Cristina Wendel
Partner
D +1 780 423 7353
cristina.wendel@dentons.com



Stephanie V. Lewis
Counsel
D +1 613 783 9651
stephanie.lewis@dentons.com



Jennifer Thompson
Senior Associate
D +1 403 268 6376
jennifer.a.thompson@dentons.com

The background of the slide features a dense arrangement of large, heart-shaped green leaves, likely Philodendron, with prominent veins. A semi-transparent purple shape, resembling a speech bubble or a stylized arrow pointing right, is overlaid on the right side of the image. The text is centered within this purple shape.

Human rights update: employees have obligations too

Cristina Wendel

Zupcic v Saputo Foods Limited, 2022 AHRC 13

- Alberta Human Rights Tribunal hearing of a complaint of discrimination in employment on the ground of physical disability.
- The Complainant worked as a machine operator for the Respondent for over 12 years.
- She alleged that the Respondent failed to accommodate an injury and that the modified work it provided exceeded her restrictions.
- Ultimately, the Respondent terminated the Complainant's employment. She filed the complaint alleging discrimination.
- The Respondent submitted that it had terminated her employment because she failed to cooperate in the accommodation process.

Zupcic v Saputo Foods Limited

- The Tribunal dismissed the complaint.
- The decision starts with a review of the 3 part test to establish a *prima facie* case of discrimination:
 - 1) The Complainant has a characteristic that is protected from discrimination.
 - 2) The Complainant has experienced an adverse impact.
 - 3) The protected characteristic was a factor in the adverse impact.
- The specific issues for the Tribunal in this case were:
 - 1) Whether the Respondent reasonably accommodated the Complainant on an interim basis?
 - 2) Whether the Complainant's disability was a factor in her termination?
 - 3) If so, was the Respondent's decision justified?

Zupcic v Saputo Foods Limited

- 1) The Tribunal reviewed the evidence and found that, as a whole, it demonstrated that the Respondent had reasonably accommodated the Complainant on an interim basis.
- 2) The Tribunal found that there was a clear connection between the Complainant's injury and her termination.
- 3) The accommodation offered to the Complainant was reasonable and the Complainant had failed to cooperate in its implementation.

Hoefman v LMT Enterprises Ltd., 2022 AHRC 43

- Alberta Human Rights Tribunal hearing of a complaint of discrimination in employment on the ground of mental disability.
- The Complainant worked as a construction superintendent for the Respondent for approximately 4 years.
- He alleged that the Respondent had subjected him to extreme and unusual mental abuse that contributed to his mental health issues. He claimed he suffered an acute event that required him to cease working and was dismissed shortly thereafter.
- The Respondent submitted that the Complainant's position was phased out due to a downturn in business. The Respondent argued that it had offered the Complainant a different position, but he had not responded. It also argued that the Complainant suffered from stress, which did not constitute a disability.

Hoefman v LMT Enterprises Ltd.

- The Tribunal dismissed the complaint.
- The decision starts with a review of the 3 part test to establish a *prima facie* case of discrimination.
- The Tribunal considered the following specific issues:
 - 1) Was the evidence sufficient to prove that the Complainant was subjected to an abusive work environment and/or had a mental disability at the time of his dismissal?
 - 2) Did the Complainant experience an adverse impact?
 - 3) If so, was his alleged mental disability a factor in his dismissal?

Hoefman v LMT Enterprises Ltd.

- 1) The Tribunal:
 - a) Declined to exercise its discretion to dismiss the complaint on the basis of issue estoppel relating to a WCB report.
 - b) Declined to draw an adverse inference against the Complainant for failing to call two of his doctors as witnesses.
 - c) Accepted that the Complainant had a mental disability during the relevant time period. The medical reports suggested that he suffered from more than simple stress.
- 2) The Tribunal found that the Complainant had not demonstrated that he was the victim of an abusive workplace; however, he had suffered an adverse impact in the loss of his position as superintendent.
- 3) The Tribunal did not accept that the Complainant's mental disability was a factor in his dismissal. The Respondent provided a clear explanation for its decision relating to its financial difficulties.

The background features a dense arrangement of large, vibrant green leaves, likely from a tropical plant like a Philodendron, with prominent veins. A semi-transparent purple shape, resembling a speech bubble or a stylized arrow pointing right, is overlaid on the left side of the image. The text is contained within this purple shape.

Vacation Refresher: hot topics and common pitfalls

Jennifer Thompson

Overview of vacation obligations

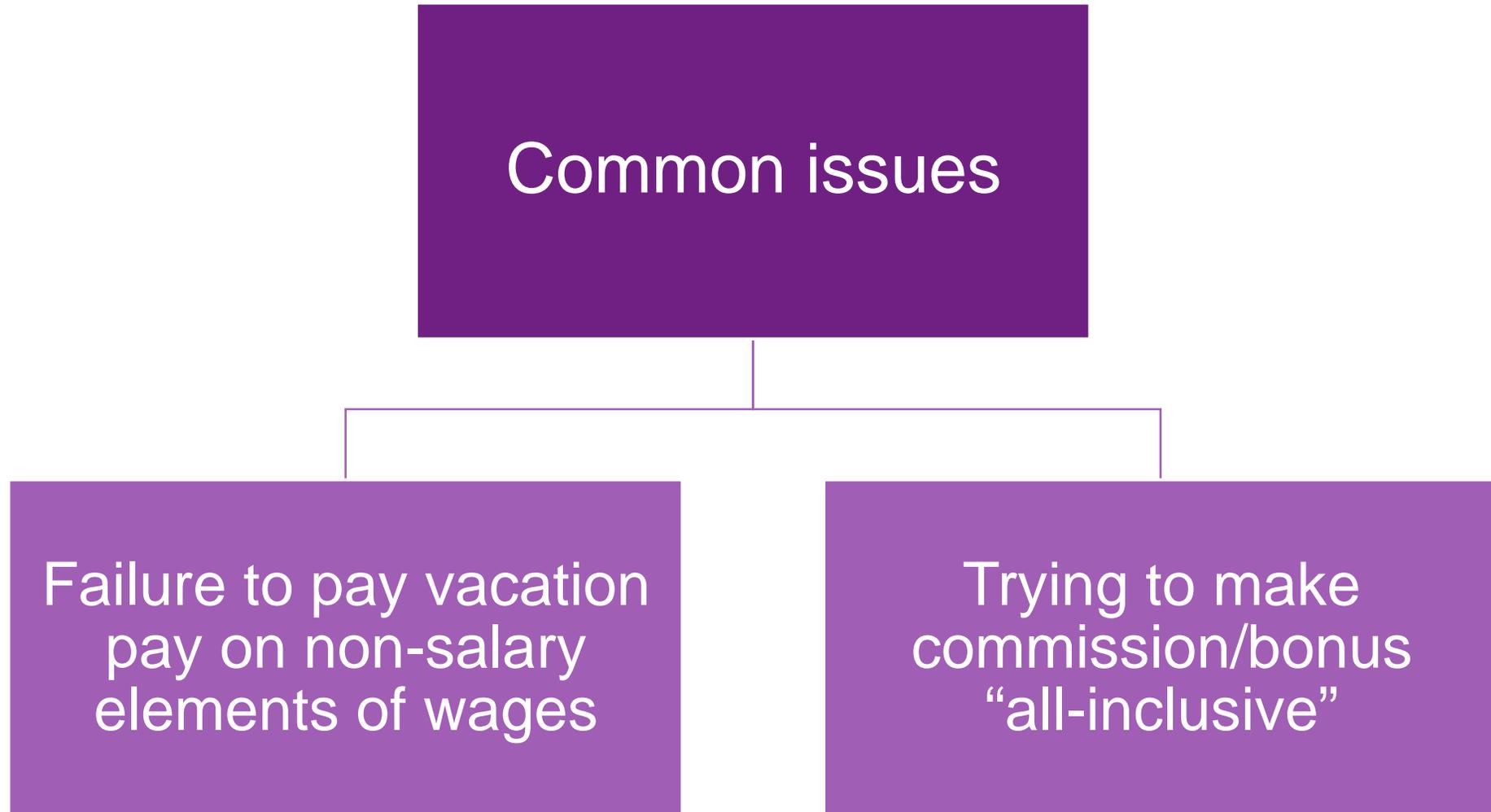


- Employees are entitled to and must receive both (unless limited exceptions apply)
- Statutory entitlements are minimums and increase with years of service
- Entitlements differ by province

Vacation pay

- Vacation pay is earned on “wages” which varies by province but generally includes:
 - ✓ Salary;
 - ✓ Commissions; and
 - ✓ Non-discretionary bonuses.
- May also include overtime, holiday pay or termination pay

Vacation pay



VACATION TIME

Under statutory schemes, accrue in first year and then take time off in second year

Most employers permit to take in year earned instead

Whichever system used - employers must ensure that statutory vacation time is taken!

Limited exceptions available

RECORDKEEPING



Ensure thorough record of vacation pay accrued and paid and vacation time taken.



Check provincial requirements to ensure compliance

HOT TOPIC #1 – UNLIMITED PAID TIME OFF

- Increasing in popularity in Canada
- This type of policy should always be in writing with the right to discontinue or amend in future!



HOT TOPIC #1 – UNLIMITED PAID TIME OFF

Advantages



Build goodwill



Attract talent and retain employees



Increase productivity



Prioritize mental health

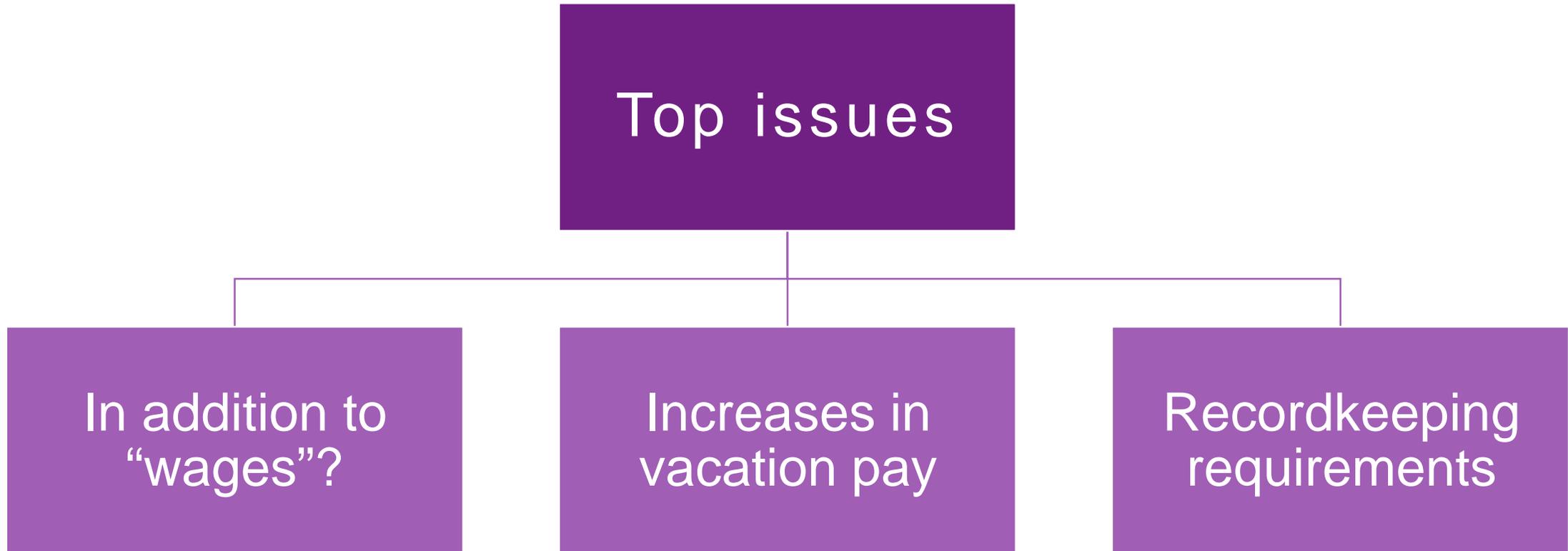
HOT TOPIC #1 – UNLIMITED PAID TIME OFF

Disadvantages/ possible issues

- Not taking enough vacation
- Taking too much vacation
- Interaction with protected leaves
- Vacation pay errors
- Recordkeeping requirements
- Workplace tension

Contact your local Dentons E&L lawyer for further advice on how to implement this type of policy

HOT TOPIC #2 – ALL INCLUSIVE COMMISSION/BONUS PAYMENTS



Contact your local Dentons E&L lawyer for further advice on how to implement this type of policy

The background features a dense arrangement of large, heart-shaped green leaves, likely Philodendron, with prominent veins. A semi-transparent purple shape, resembling a speech bubble or a stylized arrow pointing right, is overlaid on the left side of the image. The text is positioned within this purple area.

Best practices in hiring and onboarding

Stephanie V. Lewis

Agenda

- Tips for the interview process
- Advantages of written employment agreements
- Drafting best practices
- Enforceability issues
- Key terms and implications
- Employees v. independent contractors
- Common *Employment Standards Act, 2000* issues

Tips for the Interview Process

Protected under the Ontario Human Rights Code

- Employers must not engage in discriminatory hiring practices:
 - The *Ontario Human Rights Code* states at section 5(1): “Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.”

Best Practices:

- Be consistent – Keep standard list of questions common to each candidate
- Document interactions so answers received are recorded
- Maintain these records for at least 2 years – limitation period
- Only contact referees provided by the candidate
- If you wouldn't ask the applicant, don't ask their former employer

Advantages of written employment agreements

Every employee has an employment contract, even if nothing is in writing.

Advantages of written agreements:

- Provide certainty and clarity
- Reduce the risk of conflict between the parties
- Ensure compliance with statutory requirements

Certain terms must be in writing to be enforceable

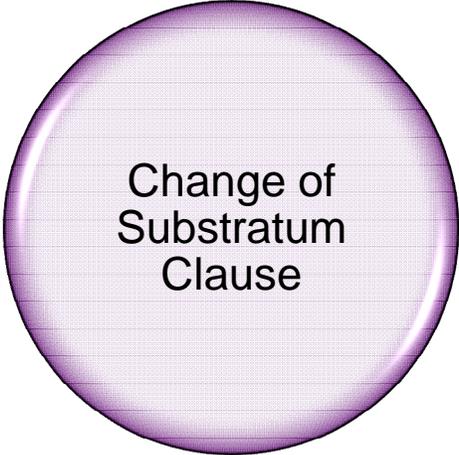
- Probationary Clauses
- Temporary layoffs
- Restrictive Covenants
- Termination Clause with Less than Common Law Entitlements

Drafting best practices for employment agreements

- Plain language is best.
- Review written workplace policies and procedures to avoid duplication.
- All key terms of the employment relationship should be addressed in one agreement.
- Careful attention should be paid to termination provisions.
- Ambiguity should be avoided.
- Ensure compliance with statutory requirements.
 - ESA poster
 - Safety Awareness Training



Enforceability issues



Change of
Substratum
Clause



Consideration
for Entering
into the
Contract



No Undue
Influence

Key Terms and Implications

- Reference Check Clauses
- Probationary Clauses
- Entire Agreement Clauses
- Termination Clauses
- Severability Clauses

Employees v. Independent Contractors

Determination requires an assessment of level of control exercised by Company.

Considerations:

Who controls the following aspects of the work:

- a. the amount of work;
- b. the nature of it;
- c. where it is performed; and
- d. how it is performed.

Which party bears the ultimate risk of loss or profit from the work?

Which party owns the tools required to perform the work?

Whether the worker is an integral part of the organization.



Employees v. Independent Contractors

Additional considerations include:

- a) Does the business deduct income tax, pension amounts or employment insurance from payments made?
 - b) Is the worker required to exclusively provide services to that business?
 - c) Does the worker submit invoices for work performed?
 - d) Is the worker entitled to benefits, vacation pay, holiday pay or other employee types of benefits?
 - e) Has the worker entered into a written contractor agreement with the company?
- Significant potential liabilities associated with a mischaracterization of the relationship.
 - See section 5.1 of *ESA*
 - Intermediate Status of Dependent Contractor

Considerations (con't):

Common *Employment Standards Act, 2000* issues

Non-Competition Clauses

- 2021 *ESA* update
- *Parekh et al v. Schechter et al.*

Overtime

- Are employees exempt or non-exempt?
- Entitlements
- Employees working overtime without approval

Common *Employment Standards Act, 2000* issues



Vacation

- Entitlement to both vacation time and pay
- What is included in calculation of vacation pay?
- Best practices

Temporary Layoffs

- Statutory requirements
- Do not exist a common law

Moderator



Adrian Miedema
Partner
D +1 416 863 4678
adrian.miedema@dentons.com

Presenters



Cristina Wendel
Partner
D +1 780 423 7353
cristina.wendel@dentons.com



Stephanie V. Lewis
Counsel
D +1 613 783 9651
stephanie.lewis@dentons.com



Jennifer Thompson
Senior Associate
D +1 403 268 6376
jennifer.a.thompson@dentons.com

Human rights update, vacation refresher and best practices in hiring and onboarding will begin shortly

大成 DENTONS

Did you know Dentons produces podcasts on a variety of topics?

Agribusiness

Arbitration

Banking and Finance

Business Insights

Employment and Labour Law

Entertainment and Media Law

Intellectual Property

Life Sciences and Health Care

Mining

Smart Cities

Tax

Transformative Technologies and Data

Women in Leadership and Entrepreneurship

Visit our Podcast page and subscribe: <https://www.dentons.com/en/insights/podcasts>

Grow | Protect | Operate | Finance

We also have blogs in various areas.

Commercial Litigation

Commercial Real Estate

Drone Regulation

Employment and Labour

Entertainment and Media

Insurance

Mining

Occupational Health and Safety

Privacy and Cybersecurity

Regulatory

Tax Litigation

Technology, New Media and IP Litigation

Transformative Technologies and Data

Venture Technology

Visit our Blogs and Resources page: <https://www.dentons.com/en/insights/blogs-and-resources>