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Trends in Employment Law:

A look forward in 2023



Employment Law Trends for 2023

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As the window for “Happy New Year” wishes winds down, our Labour and Employment Group has compiled an overview of emerging trends and issues in workplace and employment law to keep top of mind as we settle into 2023.

1. Restrictive interpretations of employment contracts likely to continue

In recent years, employment contracts have been interpreted very restrictively against employers, particularly termination provisions. This trend continued in 2022, especially in Ontario, and it can be expected to continue in 2023 in other provinces, including in Atlantic Canada. For example, in the recent Ontario decision [Henderson v Slavkin et al., 2022 ONSC 2964](#), the Court took no issue with the termination clause in the contract but held that the confidentiality and conflict of interest clauses breached the Ontario *Employment Standards Act, 2000* (“ESA”). The contract stated that breaches of either clause would constitute cause for termination. Finding that this violated the ESA on the basis that this may not necessarily constitute “wilful misconduct”, this voided the otherwise valid termination clause, meaning that the employee was awarded reasonable notice.

Given the significant potential cost of a reasonable notice award, this decision acts as a reminder to employers to revisit employment agreements, in their entirety, to ensure they are carefully drafted such that no part of the contract can be read to fall below minimum thresholds in the applicable employment standards legislation.

2. Continued challenges for employers seeking to limit bonus entitlements during common law notice periods

The 2020 decision of the Supreme Court of Canada in [Matthews v Ocean Nutrition Canada Ltd., 2020 SCC 26](#) held that language limiting entitlements during a notice period has to be clear and unambiguous. Applying this decision, courts have frequently read such language in employment contracts and bonus plans very restrictively, often awarding the employee all entitlements they would have received had they remained employed during the entire notice period.

Especially for executive-level employees, having to pay out bonus or incentive-based compensation (e.g., which are often a multiple of base salary) can be a significant liability, especially if they are awarded over lengthy notice period.

These decisions underscore the importance of taking extra care and attention when drafting employment agreements with variable compensation entitlements.

3. Employers begin to pivot from vaccination policies to communicable disease policies

Many employers have begun transitioning away from mandatory vaccination policies, moving instead towards communicable disease policies with broader application. When COVID-19 vaccinations first became available in Canada, many employers wrestled with the complexities of imposing a requirement to be vaccinated as a condition of employment. With the benefit of this experience, many employers have shifted to implementing communicable disease policies as a proactive measure in the event of another wide-spread communicable disease requiring a response in the workplace.

4. Remote work – what provincial employment standards legislation applies?

With many employees working in a province different than the physical location of the employer, the question of which provincial employment standards legislation becomes complicated.

Prior to the onset of the pandemic, remote work was far less common in many industries. In the normal course, employees physically attended work and there was often no potential for dispute about what provincial employment standards legislation applied. Nowadays, some employees live and work remotely and in provinces where the employer does not have a physical presence at all. In most cases, employment standards legislation deems the province where the work is being performed to apply. However, there are few recent decisions on this issue and questions about what province's legislation governs the employment relationship are becoming more and more common.

Given the significant differences in employment standards legislation between and amongst provinces (e.g., discrepancies in minimum entitlements), consideration of this issue is best addressed in an employment contract or remote working arrangement. However, even then, it is likely that the province in which a claim is filed will assume jurisdiction.

5. COVID-19 unlikely to be a factor in common law notice periods, going forward

In a number of reasonable notice awards in 2021 and 2022, courts considered the effect of the pandemic (e.g., resulting difficulty in job search efforts for employees) as a factor justifying an increase in the common law notice period. As a result of labour market trends throughout 2022, the impact of COVID-19 on common law notice periods in most sectors *should* be a thing of the past.

6. Occupational Health & Safety liability related to employees working remotely from home

With many employees working remotely from home, employers have grappled with the applications of duties under occupational health and safety legislation. For example, the “general duty” clauses in such legislation (e.g., obligation to ensure the health and safety of persons at or near a workplace) requires employers to take all reasonable precautions to protect the health and safety of employees at work. Historically, the “workplace” typically meant the employer’s physical premises over which it had control. Alongside the blurring of traditional conception of a “workplace” (e.g., significant numbers of people working from home) are the complexities employers face in cautiously attempting to ensure health and safety obligations while simultaneously balancing privacy interests of employees. While further guidance from courts and administrative decision-makers on these responsibilities is likely, given the reciprocal nature of occupational health and safety obligations, employees can reasonably be expected to play a role in ensuring that their home-based workplaces comply with legislative requirements.

7. Class actions challenging independent contractor status likely to continue

Since the Ontario Uber driver decisions, (which progressed to the Supreme Court of Canada in [Uber Technologies Inc. v Heller, 2020 SCC 16](#)), class actions related to the employment status of delivery drivers are on the rise. This distinction is of crucial importance if the drivers are deemed to be employees, as they would be afforded the protection of employment standards legislation. Several similar class actions began in 2022, one including Pizza Hut delivery drivers. Furthermore, in 2022 Ontario passed legislation that affords some minimum protections to persons working in the “gig economy”.

In 2023, we may see more class actions related to employment status, as well as potential legislative change affording employment-related protections to workers who historically would have been excluded from the application of employment standards legislation.

8. Transparency regarding electronic monitoring of employees

In 2022, Ontario passed legislation related to electronic monitoring of employees. Although it does not provide employees with a right to “privacy” or prevent employers from monitoring employees, the changes require employers to describe how and in what circumstances they monitor employees in an effort to increase transparency (e.g. using GPS technology while operating a work vehicle, or tracking entry and exit to the workplace through swipe cards). Other provinces may pursue similar legislative changes in this area in the future.

9. Paid sick leave obligations on the rise

Effective December 1, 2022, amendments to the *Canada Labour Code* provided federally-regulated employees with up to ten (10) paid sick days annually.

Similarly, in British Columbia, effective January 1, 2022, the *Employment Standards Act* was amended to provide provincially regulated employees with five (5) paid sick days annually.

Nova Scotia introduced a temporary sick leave program earlier in 2022; however, this was related to the COVID-19 pandemic and has since come to an end. Given the recent changes federally and in British Columbia, it would not be surprising to see other provinces implement paid sick leave obligations in the future.

10. Workplace violence and harassment legislation

As of April 1, 2019, provincially regulated employers in New Brunswick were subject to new requirements for workplace violence and harassment. Included in these new regulations were requirements for assessment and training, procedures regarding investigation and documentation, and ongoing evaluation. Both “violence” and “harassment” are broadly defined.

Similar recent amendments to legislation took place elsewhere in Canada as well, including:

- Newfoundland and Labrador: effective January 1, 2020;
- Prince Edward Island: effective July 1, 2020; and
- Federally: effective January 1, 2021

These changes reflect a trend in broadening protections against violence and harassment in the workplace – it would not be surprising to see other provinces similarly follow suit.

This update is intended for general information only, and does not constitute legal advice. If you have questions, please reach out to a member of Stewart McKelvey’s [Labour & Employment](#) Group.

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