

Employment Law Update

Key things you need to know in 2022

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Presented by McDonald HR Law Professional Corporation



Agenda - 1

- ▶ Working remotely
- ▶ Bill 27 - Right to disconnect and washroom accessibility
- ▶ IDEL provisions - ESA
- ▶ Legality of mandatory COVID-19 vaccination Policies
- ▶ Religious and medical exemptions
- ▶ Terminations for failure to comply with mandatory COVID-19 vaccination policy
- ▶ Bill 124 - Constraints on public sector salaries
- ▶ Duty to investigate before terminating for cause
- ▶ Duty to act honestly when terminating a contract
- ▶ Good faith requirement when exercising discretionary right
- ▶ Requiring releases for contractual termination entitlements



Working Remotely

- Starting Jan. 5, 2022 – we are back to Step 2 to at least 21 days
- The law for Step 2 is in [O. Reg. 263/20 Rules for Areas in Step 2](#)
- Businesses are required to implement remote working
- Exception: Any organization that delivers government operations and services, including health care (See 2.1 (1) and the 1(7))
- So remote work is not mandatory for health care and gov't service orgs
- Such orgs must follow regional medical officer of health
- Most public health orders/instructions exclude organizations delivering government services and operations, such as health care, from remote work instructions



Bill 27 - Right to Disconnect

- Impacts employers with 25+ employees as of Jan. 1, 2022
- Law - requirement to issue policy by June 22, 2022
- We don't know what needs to go into the policy until the Government issues a regulation with content details
- Hold off for now as not sure what policy will require
- If reach 25 employees after Jan. 1, 2022 – then develop policy by March 1 of following year



Bill 27 - Washroom accessibility

- Employers must provide delivery people with access to washrooms
- Exceptions
 - Unreasonable because of h/s
 - Unreasonable because of any other reason
- Very fact driven
- Think about your policy now
- If using an exception to prohibit, prepare your reasons in writing – ensure reasons are balanced
- Prep front staff on policy and how to respond to requests

▶ Handout - E-Blast



IDEL Provisions

- Set to expire on Dec. 31, 2021 (and before that Sept. 25, 2021)
- Been extended to July 30, 2022
- 3 days of paid leave and unlimited unpaid leave for
 - for all employees
 - if employee cannot perform duties because of reasons related to COVID
- Not 3 additional paid days in 2022, still only a total of 3 paid days during the entire pandemic



IDEL Provisions - Any reasons related to COVID

- The employee is:
 - Under medical supervision of doctor because they have COVID or because of mental health reason relating to COVID
 - Isolating (voluntary or involuntary) because of public health or medical direction,
 - Getting vaccinated, or
 - experiencing negative side effects of vaccination
- Employee is providing care or support to family members or people considered to be family members who are
 - sick with COVID
 - At home because of school or babysitter closures
 - In self-isolation due to COVID (i.e. elderly parents) with isolating (voluntary or involuntary) or waiting to be tested for COVID,
 - getting vaccinated, or
 - experiencing negative side effects of vaccination
 - At home because of school or other closures



IDEL Provisions

- Reductions in work due to COVID are not subject to the regular ESA lay off rules but could be common law constructive dismissal
- Resources to check for specific situations:
 - <https://www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual/part-xiv-leaves-absence#section-18>
 - <https://www.ontario.ca/document/your-guide-employment-standards-act-0/infectious-disease-emergency-leave>



Mandatory COVID-19 Vaccination Policies

- ▶ Lots of lawsuits - but no decisions from the courts
- ▶ Several arbitration decisions - unionized employers
- ▶ Mixed results - but the majority support mandatory vaccinations, especially where there is h/s at issue
- ▶ My view is mandatory vaccinations will be upheld in health care settings for positions that cannot be performed virtually



Human Rights Exemptions - Religion

- ▶ OHRC policy statement - https://www.ohrc.on.ca/en/news_centre/ohrc_policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates
- ▶ Personal preferences and singular beliefs not protected
- ▶ No approved exemptions to date
- ▶ Give due process
- ▶ Cite the OHRC policy statement in your written rejection



Human Rights Exemptions - Medical

- ▶ <https://www.cpso.on.ca/Physicians/Your-Practice/Physician-Advisory-Services/COVID-19-FAQs-for-Physicians>
- ▶ Ontario Ministry of Health December 31, 2021 Guidelines for Medical Exemptions from Covid-19 Vaccines – see handout
- ▶ Very few exemptions
- ▶ Require completion of Medical Questionnaire asking if their opinion complies with CPSO/MOH
- ▶ Even if medical exemption is met – can you accommodate?



Terminations for failure to vaccinate

- ▶ Address human rights issues before terminating
- ▶ Ensure you have tried to convince employee to vaccinate
- ▶ Employees with minimum notice entitlements (short term employees and those with good termination provisions):
 - ▶ You do not have to terminate for cause
 - ▶ Option 1 - working notice to the date they are supposed to get vaccinated and then terminate without cause. Payout any additional termination pay required
 - ▶ Option 2 – No working notice, terminate immediately and pay out minimum termination pay



Terminations with cause

- ▶ Consider with cause termination if employee has substantial notice and severance entitlements
- ▶ With cause = no termination/severance payment

- ▶ Possible recourse for employees terminated employee
 - ▶ Ontario Labour Relations Board for ESA minimums
 - ▶ Courts for wrongful dismissal



Documenting terminations for cause

- The opportunities they have been given to get vaccinated
- Why their duties cannot be performed virtually
- Why their duties cannot be done with IPAC measures
- Why an unpaid LOA is not reasonable
- Their termination is with cause because as health care professionals, they have duty to take reasonable safety precautions or co-workers and patients
- Can work out notice period to the date they were supposed to be vaccinated
- No further notice or pay
- or give gratuitous additional pay to reduce likelihood of claim
- Generally, have not been asking for releases for gratuitous amount



Record of employment for COVID Vac terminations

- ▶ Code M - Dismissal
- ▶ Optional Block 18 - refusal to comply with mandatory vaccination policy - or not

- ▶ Service Canada may call
- ▶ You do not have to answer or respond
- ▶ Must answer if they inform you in writing you are **required** to answer



Bill 124 - Wage restraint on government funded agencies

- ▶ [Protecting a Sustainable Public Sector for Future Generations Act, 2019](#)
- ▶ Effective as of 2019

- ▶ Applies to all hospitals, not for profit LTC homes, CAS, any entity that received more than 1 million in annual funding in **2018**

- ▶ Does not apply to the OMA Physician Services Agreement or any for-profit organizations



Bill 124 - 3-year moderation period

- ▶ 3-year moderation period that must start no later than January 1, 2022

- ▶ During the 3-year moderation period, there is:
 - ▶ a 1% cap on salaries
 - ▶ and a 1% cap on total compensation package costs (salaries, benefits, bonuses, RRSPs)
 - ▶ for each of the 3 years in the moderation period

- ▶ Increases in benefit premiums imposed by 3rd party do not count as an increase in compensation



Bill 124 - Exceptions

- ▶ Exception to the 1% cap on **salaries**, if the salary increase is:
 - ▶ authorized under a compensation plan
 - and**
 - ▶ the increase is in recognition of:
 - ▶ An employee's length of employment
 - ▶ An assessment of performance
 - ▶ The employee's successful completion of a program or course of professional or technical education



Bill 124 - Legislative uncertainties

- ▶ No definition of "compensation plan"
- ▶ Not specific about when compensation plan had to exist
 - ▶ But likely pre- November 7, 2019 based on arbitration decisions
- ▶ Not certain if MOH guidelines of salaries ranges can be considered a compensation plan
- ▶ There is no enforcement or penalty mechanism in Bill 124
- ▶ These are the rules for non-unionized. Similar rules for unionized
- ▶ Handouts- Technical Briefing



Duty to investigate before termination for cause

- ▶ Manitoba Court of Appeal, *McCallum v Saputo*, 2021 MBCA 62 (CanLII)
- ▶ No free-standing duty to investigate before terminating for cause, unless the specific wording of a contract says otherwise
- ▶ And an employer can rely on after acquired facts if the employee challenges the decision



Practically speaking

- ▶ Failing to investigate before terminating for cause could hurt employers in defending the just cause decision
- ▶ Determine whether you need for cause at all
- ▶ Employers should do a preliminary investigation before terminating for cause
- ▶ Put the allegations to the employee and give employee opportunity to explain
- ▶ Inform the employee of the decision and the reasons for the decision



What about terminations without cause?

- Generally, don't have to give general reasons or give stock reasons
 - skill set better suited to a more traditional health clinic, working one on one with a few physicians
 - you do not appear happy here
 - Restructuring
- But if risk of human rights, then better to set out reason to indicate decision it is not discriminatory
- Caveat : employee should not be hearing of reason for first time during termination meeting



Duty to act honestly when terminating a contract

- ▶ *C.M. Callow Inc. v. Zollinger* - Supreme Court of Canada
- ▶ Good faith and honesty are central to all contracts
- ▶ Employers owe a duty of good faith to employees
- ▶ No positive duty to disclose intention to terminate a contract in the future
- ▶ But employers cannot actively mislead employees into believing employment is secure
- ▶ If employer knows employee is under a misconception about security of a contract, especially one that may or may not be renewed, employers have a duty to correct misconception



Practically speaking

- ▶ If you know you are going to terminate employment but cannot do it until later (i.e., because of Christmas)
- ▶ Document the decision to protect against future claims of discrimination or harassment
- ▶ Do not give promises you cannot keep
- ▶ Do not ignore the person - instead, be warmly neutral
- ▶ Don't raise any performance issues unless absolutely necessary
- ▶ If you must decide between telling the person early and misleading, tell the person and explain you did not want to do this now, but you had no choice and why you had no choice.



Good faith exercise of discretion

- ▶ [Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, SCC, 2021](#)
- ▶ Where employer has total discretion under a contract or a policy to make changes to a term of the contract/policy, the discretion must be exercised in good faith
- ▶ Very fact specific but some examples:
 - ▶ Policy allows unpaid LOAs for personal reasons - totally discretionary. Must have a good faith rational for denying the request
 - ▶ Bonus policy -totally discretionary. Must have a good reason for not giving some employees bonuses



Good faith exercise of discretion

- ▶ Failure to exercise discretion in good faith could give employee basis for constructive dismissal
- ▶ Best defence when making difficult decisions, explain:
 - ▶ You considered both interests
 - ▶ Why you decided as you did



No release for contractual entitlements

- ▶ [Perretta v. Rand A Technology Corporation, 2021 ONSC 2111 \(Car LJ\)](#)
- ▶ Do not demand a release for contractual entitlements to termination
 - ▶ Never ask for a release to get ESA minimums
 - ▶ If your contract provides for more than ESA, never ask for a release for the additional payment unless the contract specifies a release is necessary
- ▶ If you do either, the contract is void and you are exposed to common law damages



CPP costs increasing

- ▶ 2021 - maximum contribution was \$3,166.45
- ▶ 2022- Maximum contribution is \$3,499.80
- ▶ Increase from 5.45% of eligible pay to 5.7%, subject to the max contribution



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