大成 DENTONS

Wednesday, September 14, 2022

Dentons' 23rd annual Ottawa employment law client appreciation webinar

Grow | Protect | Operate | Finance

大成 DENTONS

Speakers

Catherine P. Coulter
Counsel
D +1 613 783 9660
catherine.coulter@dentons.com

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

Julia Dales
Associate
D +1 613 783 9687
julia.dales@dentons.com

Maggie Sullivan
Associate
D +1 613 288 2706
maggie.sullivan@dentons.com

Special guest

大成 DENTONS

Catherine P. Coulter

What’s new and exciting in employment law?

Class Actions

1. Fresco v. CIBC (Ont. C.A.)(2022)

- Fresco in an overtime entitlement class action case.
- Section 174 of the CLC states that “when an employee is required or permitted to work overtime, they are entitled to (a) be paid for the overtime at a rate of wages not less than one and one-half times their regular rate of wages…”
- The Court of Appeal accepted the motions judge’s determination on the meaning of section 174, as follows:
    - The CLC imposes liability for overtime “whenever it is permitted, even if it is not required or authorized. The intent of the Code is to protect employees who are simply allowed to work overtime without pay.
    - An employer cannot “simply look the other way when an employee is working beyond the standard hours” then claim the work was not required or permitted.
    - In other words, an employer is liable for permitting overtime if it “acquiesce[s] by its failure to prevent.”

Class Actions, con't.

2. Montaque v. S-Trip (Ont. S.C.J.)(2022)

- S-Trip was a class action arising from the improper classification of volunteers as non-employees.
- In June of 2022, the Ontario Superior Court of Justice certified the 2018 class action, which led to a quick settlement.
- Unpaid "volunteers", who received only a nominal stipend for as much as 14 hours of work per day while escorting high school students on trips, will be eligible under the settlement for pay on an 8 hour/day basis.

Working for Workers Act, 2022 (Bill 88)

1. Digital Platform Workers Rights Act, 2022

- Applies to those who work for application-based services, such as ride-share drivers, food-delivery drivers and couriers.
  - Guarantees a $15/hour minimum wage.
  - Introduces mandatory recurring pay periods and pay days.
  - Prohibits tips from being withheld.
  - Provides the right to have disputes held in Ontario.
- Of note, digital platform workers are still not considered to be employees, and their rights were not codified in the Employment Standards Act, 2000; however they have these new rights under this new piece of Ontario legislation.

Working for Workers Act, 2022 (Bill 88)

2. Written Policy on Electronic Monitoring

- A written policy on electronic monitoring will be required as of October 11, 2022 by all employers with 25 or more Ontario employees.
- Policies will need to include the following:
  - Information regarding whether the employer electronically monitors its workers;
  - If so, a description of how such monitoring is performed, and under what circumstances; and,
  - The purpose of collecting information through such electronic monitoring.
- Electronic monitoring policies must be dated and track any dates of amendment.
- Employers must provide copies of the policy to all employees, including those assigned by temporary help agencies, and must also provide any amendments to existing policies to all employees.

Working for Workers Act, 2022 (Bill 88)

3. Amendments to the Occupational Health and Safety Act

- The Occupational Health and Safety Act (OHSA) will increase the maximum fines for directors and officers of a corporation from CA$100,000 to CA$1.5 million.
- The OHSA will also increase the maximum fines for other individuals from CA$100,000 to CA$500,000.
- As a result of Bill 88, the limitations period for instituting a prosecution under the OHSA will be extended from 1 year to 2 years.

Bill 96

An Act respecting French, the official and common language of Quebec

- https://www.dentons.com/en/insights/articles/2022/may/27/main-impacts-of-the-adoption-of-the-act-respecting-french

Farewell to the Deemed IDEL

The Deemed Infectious Disease Emergency Leave expired on July 31/22

- The Infectious Disease Emergency Leave (IDEL) under section 50.1(1) of the ESA remains in place and provides a protected leave to anyone who cannot work due to personal medical issues or family medical issues related to COVID-19.

- However, the Deemed IDEL under O. Reg. 288/20 has now disappeared.

- The Deemed IDEL was the protection to employers against constructive dismissal claims for placing employees on unpaid leave for financial reasons arising out of COVID-19, or a failure to adhere to vaccination mandates.

- Remaining options include: (i) moving employees to a temporary lay-off under the ESA; (ii) returning employees to work; or (iii) termination of employment without cause.

Workplace Investigations

1. Render v. Thyssen Krupp (Ont. C.A.)

- The courts have moved from assessing the severity of sexual harassment towards treating each incident of sexual harassment as serious.
  - Employers do not have a duty to consider less severe sanctions before terminating
  - Termination is justified as long as termination is proportionate to the severity of the conduct

Workplace Investigations

2. McGraw v. Southgate (Ont. S.C.J.)(2021)

- Emphasizes the need to fairly conduct an investigation into allegations of inappropriate workplace behaviour, even if an employee is being terminated without cause as a result of the investigation.
    - The fire department's investigation was a single memo and some handwritten notes;
    - There were no witness statements obtained or provided;
    - The Plaintiff was not interviewed during the course of the investigation; and
    - The investigation memo relied almost exclusively on inaccurate and dated second-hand information.

- The court ultimately awarded the Plaintiff (i) 6 months of notice; (ii) $75,000 for moral damages; (iii) $35,000 for damages for discrimination under the Ontario *Human Rights Code*; (iv) $20,000 for damages for defamation; **and** (v) $60,000 for punitive damages.

大成 DENTONS

Maggie Sullivan

Hybrid work: Where are we now?

How can employers handle changes to the terms

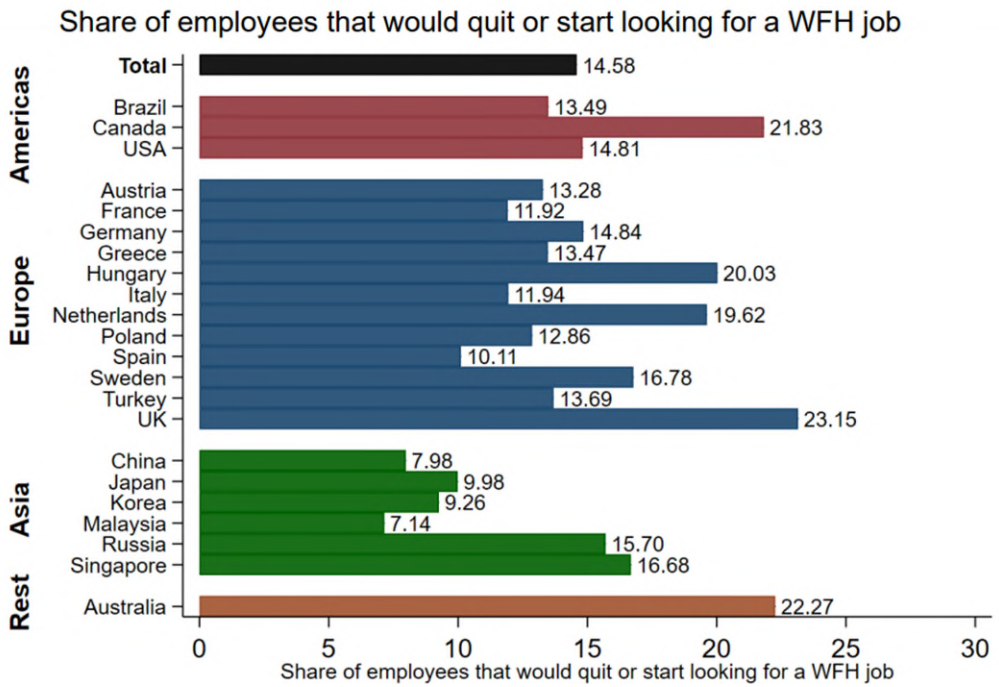
Hybrid work may bring yet another change to an employee’s work routine

- Best Practices:
  - Open dialogue and transparency
  - Notice
  - Flexibility

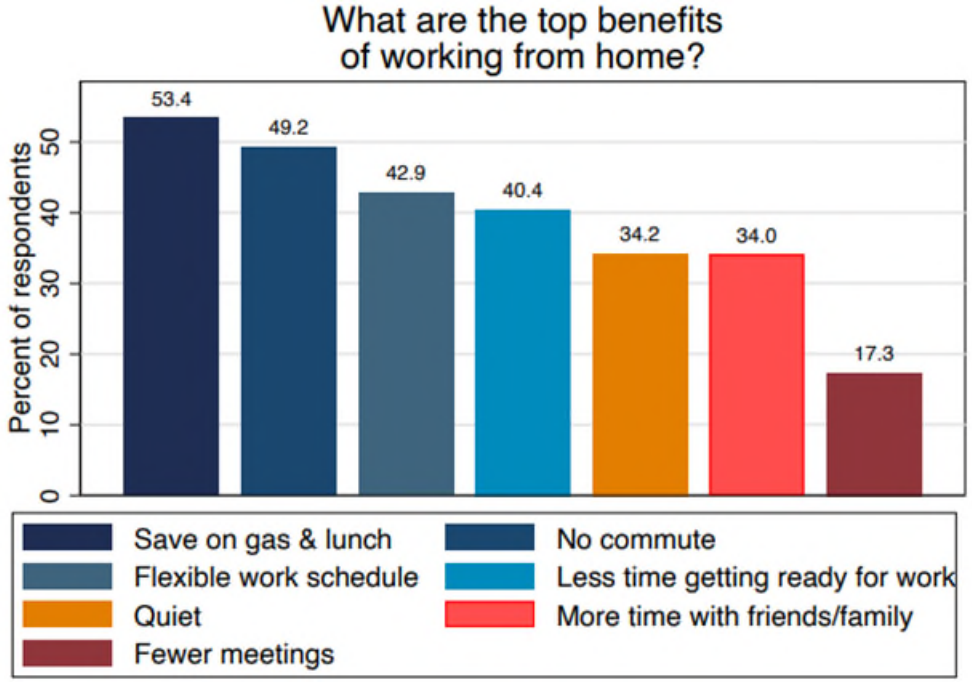
  - Article:COVID-19 changed office work. Here's what the 'next normal' looks like as people return | CBC News

How can employers handle changes to the terms

Hybrid work may bring yet another change to an employee's work routine



Global Working from Home Research March 22, 2022



Working from Home Research Updates August 26, 2022

How can employers handle changes to the terms

Hybrid work may bring yet another change to an employee's work routine

- Best Practices:
  - Open dialogue and transparency
  - Notice
  - Flexibility

- Remember any possible duty to accommodate
- Dentons - COVID-19: Accommodation and the Return to the Workplace – Considerations for Ontario employers

How can employers handle changes to the terms of employment?

Constructive Dismissal

- Any change to an employee’s rights that existed pre-pandemic may lead to a claim for constructive dismissal

Concerns with monitoring employees while

Employers must monitor hours worked and overtime

- Fostering a healthy work-life balance

- Create a hybrid work/working from home policy
  - Ontario’s Disconnecting from Work Policy

Workplace injuries while working remotely

The same workplace injury obligations apply to remote wok

- Employers have the same responsibilities with respect to workplace illnesses and injuries when their employees are working from home
- Not every injury that happens at home is a workplace injury – the injury needs to be related to work

- *Air Canada and Gentile-Patti*, 2021 QCTAT 5829

Where employees work from while working

Can employees work remotely in another province or country?

- Employment law considerations
- Visa considerations
- Tax considerations

大成 DENTONS

Guest speaker

Employee terminations through the lens of employee-side counsel

Work is Fundamental

Justice Iacobucci in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986

I turn finally to the policy considerations which impact on the issue in this appeal. Although the issue may appear to be a narrow one, it is nonetheless important because employment is of central importance to our society. As Dickson C.J. noted in Reference Re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 368:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*

I would add that not only is work fundamental to an individual's identity, but also that the manner in which employment can be terminated is equally important.

大成 DENTONS

Julia Dales

Termination law updates

Enforceable Termination Clauses

General principles | statutory

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*".

Enforceable Termination Clauses

General principles | judicial

Applicable principles courts consider when determining enforceability of a termination clause:

1. Employees have less bargaining power than employers when employment agreements are made;
2. Employees are likely unfamiliar with employment standards in the ESA and thus are unlikely to challenge termination clauses;
3. The ESA is remedial legislation, and courts should therefore favour interpretations of the ESA that encourage employers to comply with the minimum requirements of the *Act*, and extend its protection to employees;
4. The ESA should be interpreted in a way that encourages employers to draft agreements which comply with the ESA;
5. A termination clause will rebut the presumption of reasonable notice only if its wording is clear, since employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment; and
6. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

- *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 28,

Enforceable Termination Clauses

General principles | judicial, continued

- "Where an employment agreement is not consistent with the ESA, it becomes invalid irrespective of the actual arrangements made with an employee on termination, and the terminated employee becomes entitled to common-law damages." - *Henderson v. Slavkin et al.,* 2022 ONSC 2964 at para 26
- "Contracts are to be interpreted in their context in a way that the parties reasonably expected the contract would be interpreted when they entered into it" - see *Oudin v. Centre Francophone de Toronto,* 2016 ONCA 514
- "The court should not strain to create ambiguity where none exists in the context of interpreting the termination clause" - see *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 at para 63
- "a high degree of clarity is required and any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the principle of *contra proferentem*" - *Nemeth v. Hatch Ltd*., 2018 ONCA 7 at para 12
- "It is sufficient if a provision of an employment contract *potentially* violates the ESA at any date after hiring" - *Rutledge v. Canaan Construction Inc*., 2020 ONSC 4246, at para 15
- "Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship" - *Machtinger v. HOJ Industries Ltd*. 1992 CanLII 102 (SCC), p. 1004.

Enforceable Termination Clauses

General principles | applied

Enforceable termination clauses therefore require:

- Providing EE with applicable statutory notice AND severance pay
- Providing EE with benefits continuance through notice period
- Providing EE with vacation accrual through notice period
- Providing EE with earned incentives/bonuses through notice period
- No cap on notice in an amount less than ESA potential entitlements
- Limiting EE to *only* ESA minimums
- Express waiver of common law entitlements
- Properly defined probationary period (3 months less one day)
- Naming correct legislation
- No requirement for release in exchange for ESA minimums

The Law after Waksdale

1. *Waksdale v Swegon North America Inc.* 2020 ONCA 391

- The June 17, 2020 decision changed landscape of law on termination clauses
- Employee terminated without cause
- Termination for cause language in employment agreement cited laundry list of causal conduct
- ONCA holds that the cause language undermines the ESA as it does not meet ESA definition of cause

  ESA definition: *An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.*

- ONCA finds the for cause language renders unenforceable the otherwise-enforceable without cause language <u>despite severability clause and that it did not matter that the EE was not terminated under that clause:</u>

  "…the court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant." – para 11

The Law after Waksdale

1. What amounts to ESA cause?

- The wilful misconduct standard requires evidence that the employee was “being bad on purpose” - *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, at para. 79

- For example, persistent carelessness does not meet the wilful misconduct standard.-- *Oosterbosch v. FAG Aerospace Inc.*, 2011 ONSC 1538

- “…wilful misconduct is a higher standard than just cause at common law, as it involves an assessment of subjective intent, whereas just cause is a more objective standard. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the *ESA* wilful misconduct standard”

- “By contrast, common law just cause for dismissal may be found on the basis of prolonged incompetence, without any intentional misconduct.”

-*Khashaba v Procom Consultants Group Ltd.* 2018 ONSC 7617 Carole J. Brown, J., citing *Plester v. PolyOne Canada Inc*., 2011 ONSC 6068 (Ont. S.C.J.), aff'd 2013 ONCA 47 (Ont. C.A.) confirmed at para. 53

The Law after Waksdale

2. Actual and potential repercussions of *Waksdale*

- Employment contracts need to cite the ESA definition of just cause.
- Any language that undermines the ESA in employment agreements, handbooks, policies pose a risk to enforceable termination clauses.
- Uncertainty around drafting for allowing terminations for common law just cause.
- Court will look at enforceability at time of contracting – not enforceability at time of termination.
- Severability provisions will not save unenforceable termination language.

"…it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect." –Waksdale at para 10

The Law after Waksdale

2. Resulting Case Law

Unenforceable for cause clauses:

- **“**CannonDesign maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes just cause for summary dismissal.” - *Rahman v. Cannon Design Architecture Inc*., 2022 ONCA 451
- “…the defendant could terminate the plaintiff’s without notice or pay in lieu of notice “should cause for termination exist under the common law of the courts of Ontario.” - *Nicholas v. Dr. Edyta Witulska Dentistry Professional Corporation*, 2022 ONSC 2984
- “In this case, it is not clear in what circumstances the disclosure of confidential information may occur without immediate termination for cause without notice. One can conceive of a situation where confidential information may have been inadvertently disclosed in a situation where it is not wilful and/or where it is a trivial breach. This clause does not respect the ESA provisions in this regard.” - *Henderson v. Slavkin et al.,* 2022 ONSC 2964

The Law after Waksdale

2. Resulting Case Law

Unenforceable for cause clauses:

- "Employment may be terminated for cause at any time, without notice"

> "*the "for cause" termination provision is illegal as it incorporates the common law "just cause" concept, which means that an employee could be terminated without any notice for conduct that is not "willful" or "bad on purpose". This is an attempt to contract out of the minimum standards prescribed by the ESA and voids the entire clause. It does not matter what the employer might have done, the wording of the clause is determinative*." - *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 8049

The Law after Waksdale

2. Resulting Case Law

Unenforceable for cause clauses:

A conflict of interest clause was at issue in *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967:

> "*Ms. Gracias was dismissed without cause, and* ***but for the rule of Waksdale v. Swegon North America****, she would have no common law wrongful dismissal claim. However, the rule does apply to her case, and therefore, she was entitled to reasonable notice rather than the immediate notice of dismissal that she received*." – Para 89
>
> …
>
> "*The unlawful termination provision cannot be severed, and it taints the entirety of the termination provisions*" – para 94

The Law after Waksdale

2. Other Termination Case Law Updates

- “Even if the contract, properly construed, permits an employer to terminate without cause after a failed for cause termination, there are some breaches or acts of repudiation which are so significant, or of such an order of magnitude, that they render a without cause termination provision unenforceable” … “minor or technical mistakes made in good faith by the employer will not constitute a **repudiation** sufficient to prevent the employer from relying upon the without cause termination provision.” - *Humphrey v Mene,* 2021 ONSC 2539
- **Termination letter** results in moral damages - failure to advise ESA entitlements would be provided even if additional offer rejected and did not provide proper benefits/RRSP continuance and limited vacation accrual to term date - *Russell v The Brick Warehouse LP*, 2021 ONSC 4822

The Law after Waksdale

2. Other Termination Case Law Updates

- “In my view, the motion judge erred in law when he allowed considerations of Ms. Rahman’s **sophistication** and access to independent legal advice, coupled with the parties’ subjective intention to not contravene the ESA, to override the plain language in the termination provisions in the Employment Contracts” - *Rahman v Cannon Design Architecture Inc.,* 2022 ONCA 451
- Appellant slapped a female co-worker on her buttocks. Trial judge found that the incident caused a breakdown in the employment relationship that justified dismissal “for cause”. ONCA says “**Wilful misconduct** involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of cases: cases of wilful misconduct will almost inevitably meet the test for just cause but the reverse is not the case…Although his conduct warranted dismissal for cause, it was not the type of conduct in the circumstances in which it occurred that was intended by the legislature to deprive an employee of his statutory benefits.” - *Render v ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310.

大成 DENTONS

Stephanie V. Lewis

Best practices when starting the employment relationship

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.
- Worthwhile to review employer’s written policies and procedures.
- 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

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

Common *Employment Standards Act, 2000* issues

Non-competition Clauses

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

大成 DENTONS

Thank you

Catherine P. Coulter
Counsel
D +1 613 783 9660
catherine.coulter@dentons.com

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

Julia Dales
Associate
D +1 613 783 9687
julia.dales@dentons.com

Maggie Sullivan
Associate
D +1 613 288 2706
maggie.sullivan@dentons.com

Special guest

大成 DENTONS

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

Agribusiness
Arbitration
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

大成 DENTONS

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

Grow | Protect | Operate | Finance