

The Dentons logo consists of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the slide is a dark purple gradient with a large, semi-transparent white arrow shape pointing right, and a close-up image of a sunflower's center in shades of orange and purple.

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Cross-Canada Labour and Employment update

April 26, 2024

Grow | Protect | Operate | Finance

Moderator:



Andy Pushalik
Partner, Toronto, Canada
+1 416 862 3468
andy.pushalik@dentons.com

Speakers:



Catherine Coulter
Counsel, Ottawa, Canada
+1 613 783 9660
catherine.coulter@dentons.com



Carly Kist
Associate, Calgary, Canada
+1 403 268 6861
carly.kist@dentons.com



Nicolas Séguin
Associate, Montreal, Canada
+1 514 878 5876
nicolas.seguin@dentons.com



**Highlights of the *Act to prevent and fight psychological harassment and sexual violence in the workplace* (“Act”)
in Quebec**

Nicolas Séguin

Introduction

Objectives of the Act

The Act received Royal Assent on **March 27, 2024**.

It introduces amendments to labour, employment and occupational health and safety legislation, namely to:

- 1) better protect workers who are victims of psychological harassment and sexual violence in their workplace; and
- 2) provide a framework for the recourses to ensure such protection.

Key amendments proposed by the Act

Act Respecting Industrial Accidents and Occupational Diseases

Presumption of Employment Injury

The existence of an employment injury will be presumed in the following situations:

- 1) Injuries or diseases shall be presumed to have arisen out of or in the course of the worker's work when it results from sexual violence suffered by the worker and committed by the worker's employer, one of the employer's officers in the case of a legal person or one of the workers whose services are used by such employer;
- 2) Diseases occurring within three months after the worker has suffered sexual violence in the workplace will be presumed to be an employment injury.

This amendment will come into force on **September 28, 2024**.

Key amendments proposed by the Act

Act Respecting Industrial Accidents and Occupational Diseases

Access to Medical Records

- Healthcare professionals can only communicate a summary of the medical records kept by the CNESST relative to the information that is necessary for the employer's contestation.
- Fines may be imposed.

This amendment will come into force on **September 28, 2024**.

Key amendments proposed by the Act

Act Respecting Industrial Accidents and Occupational Diseases

Claim Period for Victims of Sexual Violence

- The deadline for filing a claim for an occupational injury or disease resulting from sexual violence with the CNESST will be extended to two (2) years.

This amendment will come into force on **September 28, 2024**.

Key amendments proposed by the Act

Act Respecting Labour Standards

Psychological Harassment Prevention and Complaint Processing Policy

- The Act includes a list of elements that must be included in the employer's policy on the prevention and treatment of psychological harassment.

This amendment will come into force on **September 28, 2024**.

Key amendments proposed by the Act

Act Respecting Labour Standards

Employer's Obligations

- The obligations to prevent and stop psychological harassment now expressly extend to third parties in the workplace, such as the employer's customers, subcontractors and suppliers.

This amendment has come into force on **March 27, 2024**.

Key amendments proposed by the Act

Act Respecting Labour Standards

Protection Against Reprisals

- Victim of reprisals following the filing of a psychological harassment complaint could file a complaint with the CNESST for a prohibited practice against the employer.

This amendment has come into force on **March 27, 2024**.

Key amendments proposed by the Act

Act Respecting Labour Standards

Amnesty Clauses

- Prohibit the application of amnesty clauses with respect to disciplinary measures imposed on an employee for misconduct involving physical, psychological or sexual violence.

This amendment has come into force on **March 27, 2024**.

Key amendments proposed by the Act

Act Respecting Occupational Health and Safety

1. Expanded Definition of “Sexual Violence”

The Act introduces the definition of "sexual violence", which reads as follows:

means any form of violence targeting sexuality or any other misconduct, including unwanted gestures, practices, comments, behaviours or attitudes with sexual connotations, whether they occur once or repeatedly, including violence relating to sexual and gender diversity.

2. The employer’s general obligation is amended to introduce a specific regulatory power to provide for any measures to be taken by employer to prevent or put a stop to sexual violence.

This amendment has come into force on **March 27, 2024**.



An update on employers' vacation pay obligations

Catherine Coulter

Vacation pay obligations

A vacation refresher

Tip #1:

If you don't currently add at least the statutory 4% or 6% vacation pay to your commission or incentive bonus payments to employees, you probably have a vacation pay liability.

Vacation pay obligations

A vacation refresher

Tip #2:

Vacation pay liabilities are not just a corporate liability, but also a liability to corporate directors.

Vacation pay obligations

A vacation refresher

Tip #3:

Carefully track the vacation time your employees take, and the vacation pay which they are paid. Be particularly careful to do this if you grant unlimited paid time off, or if you grant more vacation than is statutorily required.

Vacation pay obligations

A vacation refresher

Tip #4:

Make sure that you make it clear in an employment agreement or vacation policy as to what vacation carries forward if unused, and what vacation is forfeited. Statutory vacation time and vacation pay can **never** be forfeited.

Vacation pay cases

Grimaldi v. CF&D Custom Fireplace Design Inc.

Employees who continue to receive pay during vacation or at the start of their vacation are not entitled to extra vacation pay during a common law notice period.

Vacation pay cases

Jimmy How Tein Fat v. PRGX Canada Corporation

The “discoverability principle” applies to vacation pay claims. This means that it may get employees around a *Limitations Act* defence or to extend the period of time during which unpaid vacation pay is owed.

Legislative updates

Bill 149, Working for Workers Four Act, 2024 (Ontario)

Effective as of June 21, a written agreement is required if an Ontario employer intends to pay vacation pay with any method other than a lump sum amount prior to an employee's vacation time.



Recent caselaw developments in Alberta

Carly Kist

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

Facts

- **3 complainants, 6 complaints**
 - Oliva
 - Gender-based harassment
 - Physical disability
 - Retaliation
 - Pascoe
 - Gender-based harassment
 - Retaliation
 - Strong
 - Gender-based harassment
- **Respondent: Gursoy**

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

Preliminary Issue – Abuse of Tribunal’s Processes:

- Gursoy chose not to cross-examine the Complainants;
- The Director could not cross-examine Gursoy;
- Gursoy could not call his witnesses.

Sexual harassment:

- Unwelcome conduct
- of a sexual nature
- that affects the environment or leads to job-related consequences

Prima facie discrimination:

- the complainant has a characteristic protected from discrimination by the Act;
- they have experienced an adverse impacts, and
- the protected characteristic was a factor in the adverse impact.

Retaliation:

- There is a link between the allegedly retaliatory action and the filing of the complainant’s human rights complaint, and
- The allegedly retaliatory action was, at least in part, a deliberate response by the respondent to the filing of the complaint.

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

Findings

Gender-based discrimination / sexual harassment:

- Sexually suggestive nicknames;
- Comments about physical appearance and dress;
- Inappropriate touching;
- Inappropriate requests;
- Yelling and swearing;
- Demotion due to pregnancy (limitations issue – considered for context only).

Discrimination based on physical disability:

- Demanding medical information following a doctor's appointment.
- No reasonable justification for this demand – Oliva had not asked for accommodation nor had her condition interfered with her work.

Retaliation:

- Filing of 2 Statements of Claim referred to discrimination complaints; alleged conspiracy; inflated damages; conduct associated with filing.

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

General Damages

- No statutory limit on damages for mental distress, injury and loss of dignity.
- *Walsh* test:
 - Objective seriousness of the discrimination;
 - Particular effect on the complainant.

! Sexual harassment is a barrier to equality in the workplace and must be discouraged and denounced.

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

Outcome

	Oliva	Pascoe	Strong
Harassment and discrimination complaint	General damages - \$75,000 Wage loss - \$26,800	General damages - \$30,000 Wage loss - \$11,200	General damages - \$50,000
Retaliation complaint	General damages - \$50,000 Special damages - \$3,291.03	General damages - \$25,000 Special damages - \$1,353.88	

Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45

Key takeaways

- Trend towards higher general damages awards - \$75,000 is the highest general damages award that the Alberta Human Rights Tribunal has awarded to date for any one human rights complaint to date.
- Gender-based discrimination in the workplace may result in significant liability for employers.

Prosser v Industrial Alliance Insurance, 2024 ABKB 87

Facts

- A harassment complaint was made against the Plaintiff.
- Employer began an internal investigation, but quickly retained an external human resources consultant to carry-out investigation.
- A second harassment complaint was made against the Plaintiff during the investigation.
- The Plaintiff was terminated.
- Wrongful dismissal action.
- Plaintiff applied for disclosure of various records and information concerning the Employer's decision to terminate the Plaintiff for cause:
 - Transcript and recording of the Plaintiff's interview by the investigator.
 - Transcript and recording of the first complainant's interview by the investigator, and the records of the interview.
 - Identity of the second complainant, particulars of the allegations, and the information gather from the complainant, including the transcript, recordings and notes of the interview.
 - Information gathered in the investigation including allegations of misconduct, particulars of various alleged incidents, names of persons present during the alleged misconduct, and interview transcripts of employee interviews conducted by the investigator.

Prosser v Industrial Alliance Insurance, 2024 ABKB 87

Issues:

- Are the records, and the information derived therefrom, privileged?
- If so, did the Defendant waive privilege by pleading matters concerning the investigation in its Statement of Defence?

Privilege Claims:

- Litigation privilege:
 - Where the dominant purpose for which the records were created was, at the time that they were made, for use in contemplated litigation?
- Solicitor-client privilege:
 - Communications between a solicitor and client given in the context of seeking or giving legal advice, intended by the parties to be confidential.

Prosser v Industrial Alliance Insurance, 2024 ABKB 87

Lawyers conducting investigations:

- Where a lawyer is only retained to conduct a factual investigation or provide non-legal advice, Courts have generally held that the communications are not privileged.
- Question: Is the investigation related to the rendition of legal services?

Findings:

- The third-party investigation was not privileged
- Purpose: ascertaining information to conduct non-privileged corporate operations
 - Policy vs privileged investigations
- Waiver of privilege: specific reliance on the information at issue in the Statement of Defence
 - Relied on the sufficiency of the evidence obtained in the investigation

Prosser v Industrial Alliance Insurance, 2024 ABKB 87

Key takeaways

- No guarantee of privilege, even where a lawyer is retained to conduct the investigation.
- The purpose of the investigation will shape how privilege is applied and asserted.



The latest on the enforcement of post-employment duties

Andy Pushalik

Non-Competition Clauses = Endangered species?

- Effective **October 25, 2021**, provincially regulated employers in Ontario are prohibited from entering into employment contracts or other agreements with an employee that include a non-compete agreement.
- Exceptions:
 - Prohibition does not apply to executives
 - Prohibition also does not apply where all of the following occur:
 - there is a sale or lease of a business or a part of a business that is operated as a sole proprietorship or a partnership
 - immediately following the sale, the seller becomes an employee of the purchaser
 - as part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale

Non-Competition Clauses = Endangered species?

- **April 23, 2024**, U.S. Federal Trade Commission issued a final rule banning non-competes nationwide
- For senior executives, existing non-competes can remain in force
- For all other workers, existing non-competes are immediately unenforceable. Employers do not have an obligation to formally rescind such agreements but must provide notices to employees informing them that the covenants are unenforceable.
- Final rule scheduled to go into effect around the **end of August 2024**
- See our [Dentons Insight](#) for more information

Restrictive Covenants in non-employment context continue to attract less scrutiny from courts

- *Wizedemy Inc. v Karras*, 2024 BCSC 630 – Court granted injunction restraining independent contractor from engaging in a competitive business
- *Demand Science Group, LLC v. Gladish*, 2024 ONSC 214 – Court granted injunction restraining sellers from engaging in a competitive business
 - “For the reasons that follow, I grant the injunction. This case arises from a commercial transaction, not a traditional employment relationship. The non-competition provision in the restrictive covenants agreement flows directly from Mr. Gladish’s decision to sell his business to the plaintiffs. Mr. Gladish has accepted the benefits of that transaction, and he must also bear its burdens.”

Post-Employment Common Law Duties Still Have Teeth : *SHAC Solutions Inc v Guenther*, 2024 ABKB 145

- All of the defendants were either employees or directors of SHAC Solutions.
- The defendants resigned as directors/employees and started a competitor business.
- Beyond contractual duties, court found that the individuals' common law fiduciary duties survived for some period of time after their resignation.
- A former fiduciary employee may not, after the end of the employment relationship,
 - use the former employer's proprietary information in a manner contrary to the former employer's best interests;
 - use the former employer's corporate opportunity unless the former employer has unequivocally decided not to pursue it;
 - solicit customers of his or her former employer until a reasonable period of time has elapsed following the end of his employment by the former employer;
 - offer employment to employees of his former employer until a reasonable period of time has elapsed following the end of his employment by the former employer.
- In the case at hand, Judge ruled that the directors/CEO and their involvement in a new competing company was minimal and granted the injunction.

Key Takeaways

- Non-competition clauses are increasingly under attack by legislators.
- Courts continue to draw a distinction when considering the enforceability of a restrictive covenant in an agreement for the sale of a business vs one contained in a contract of employment.
- Employers should rely on all types of post-employment duties to protect their proprietary interests.

Thank you



Andy Pushalik
Partner, Toronto, Canada
+1 416 862 3468
andy.pushalik@dentons.com



Catherine Coulter
Counsel, Ottawa, Canada
+1 613 783 9660
catherine.coulter@dentons.com



Carly Kist
Associate, Calgary, Canada
+1 403 268 6861
carly.kist@dentons.com



Nicolas Séguin
Associate, Montreal, Canada
+1 514 878 5876
nicolas.seguin@dentons.com

Thank you for attending!

Dentons On-Demand

Missed a webinar? We have you covered! Dentons On-Demand is your one-stop-shop for CPD/CLE-accredited national webinars highlighting the latest trends and topics which impact you and your business.

Visit our Dentons in Session page for all upcoming CPD accredited seminars or scan the QR code to access our brochure.

<https://www.dentons.com/en/about-dentons/news-events-and-awards/events/dentons-in-session>.

