DENTONS

Who's naughty and nice?

Navigating video surveillance in unionized workplaces and collective bargaining highlights

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Labour Spotlight Series

Grow | Protect | Operate | Finance

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Agenda

- Privacy law in unionized workplaces (30 min):
    - Implementation and use of video surveillance
    - Jurisdictional issues
- Bargaining trends update (10 min)
- Sneak peek – New case law regarding drug testing in unionized workplaces (10 min)
- Q & A (10 min)

Privacy law overview

- Statutory privacy law is relatively new in Canada.
- Only British Columbia, Alberta, and Quebec all have their own privacy laws applicable to private organizations.
- The federal legislation, PIPEDA, will apply in the absence of provincial privacy legislation.
- In the absence of legislation, labour arbitrators have developed guidance for employers and unions regarding workplace privacy.
- The primary issue related to privacy in the workplace is the introduction of video surveillance.

Video surveillance in the workplace

Admission into evidence

- The issue of video surveillance generally arises in connection with attempts by the employer to rely on video recordings as evidence.
- There are two schools of thought among arbitrators on whether such evidence should be admitted:
    1. Relevancy
    2. Reasonableness
- The difference between these two approaches is whether there is a right to privacy in the workplace.

Video surveillance in the workplace

The relevancy approach

- Based on the premise of that employees have no standing right to privacy in the workplace.
- Arbitrators are strictly interested in whether any video recording is relevant and probative to the issue in dispute. Absent compelling reasons video evidence will be admitted as evidence.
- Video evidence will not be admitted where:
    - the CBA expressly prevents the employer from collecting or relying on it;
    - there is some form of privilege that would otherwise apply; or
    - the admission of the evidence would be harmful to labour relations.

Video surveillance in the workplace

What is “relevant”?

The question of relevancy can be broken down into the following considerations:

1. Is the disputed evidence relevant? (i.e. were the contents of the video recordings the basis that the employee had engaged in misconduct?)
2. Is the evidence reliable?
3. Does the prejudicial effect of the evidence outweigh its probative value?

Video surveillance in the workplace

The reasonableness approach

- Based on the premise of that employees have a right to privacy in the workplace.
- When determining admissibility, arbitrators who adopt this approach will consider:
    1. If there were reasonable (objective) grounds to conduct the surveillance; if so,
    2. Was the surveillance conducted in a reasonable manner.
- This approach is generally favoured by arbitrators in jurisdictions where privacy legislation is applicable.
- Arbitrators who adopt this approach tend not to support continuous or surreptitious monitoring of employees.

Video surveillance in the workplace

What is “reasonable”?

What is “reasonable” will depend on the context and normally include considering such factors as:

- the basis of the employer's suspicion of the employee;
- the nature of the potential harm to the employer's enterprise;
- the degree of impairment to the trust factor;
- the alternatives available to obtain the required information; and
- the degree of intrusion caused by the particular surveillance method.

Video surveillance in the workplace

Can you actively monitor employees at work?

1. What does the collective agreement say?

    Employers have broad management rights – unless expressly limited.

2. If silent – is video monitoring “necessary”?

    Examples: theft, vandalism, mischief, sabotage, breach of employer policy.

3. Monitoring employees for the purpose of supervision is not generally considered “necessary”.

    Balance between employee privacy interests and the need for monitoring.

Video surveillance in the workplace

Getting video surveillance into evidence at arbitration

In order to successfully admit video surveillance evidence of employee misconduct at arbitration, an employer should be prepared to demonstrate that:

1. the evidence is relevant and probative;
2. the collection or use of the evidence does not violate any provisions of the collective agreement;
3. there was a legitimate reason to collect the video evidence; and
4. the method of collection was reasonable.

Video surveillance in the workplace

What if misconduct is discovered inadvertently?

OPSEU and Ontario (Ministry of the Solicitor General), Re, 2021 CarswellOnt 12995

- Employer used video surveillance for “safety and security of staff, inmates and property”.
- Employer reviewed video surveillance in response to an inmate death, and noticed that guards were not completing their shift changes properly. In response, the Employer conducted further spot checks by video.
- Union grieved use of video surveillance for this purpose.
- The collective agreement expressly stated that video was “not to be used as a replacement for supervising or managing; or as a means to evaluate employee performance”.
- Arbitrator found that video spot checks were unnecessary, and also breached the collective agreement.

Ontario – case studies

O.L.B.E.U. v. Ontario (Liquor Control Board), 2005 CarswellOnt 3505

- The grievor was terminated for improper use of the store's "Air Miles" program.
- Employer reviewed video tapes after obtaining other evidence indicating that the grievor had improperly used his spouse's points card in customer transactions.
- The union objected to the admission of video surveillance on the basis that the employer had no reasonable grounds to initiate surveillance; the surveillance was not conducted in a reasonable manner; and the surveillance was an unreasonable intrusion of the grievor's privacy.
- The Arbitrator applied the reasonableness approach but found that the video surveillance was a reasonable intrusion on the limited level of privacy the employee could expect while working in a retail store.

Ontario – case studies

MVT Canadian Bus, Inc. and ATU, Local 1775 (Regal), Re, 2018 CarswellOnt 2324

- The grievor, a bus operator, was discharged following receipt of a complaint from a passenger on the grievor's bus regarding excessive amount of foul language and having an inappropriate conversation about his wife.
- After receiving the complaint, the employer retrieved a recording of the conversation in question from the bus the grievor had been driving. The video/audio recording verified the employee had used profane language and had made threatening comments about another individual.
- The union argued that surveillance on buses was only meant to be used for safety reasons (and the grievor’s remarks did not create a sufficient safety concern), and the employer violated the collective agreement.
- The Arbitrator found that the use of video surveillance was a pre-existing technology permitted by the collective agreement, and the recording was admissible under both the relevance and reasonableness tests.

Ontario – case studies

Niagara Falls (City) and ATU, Local 1582, Re, 2015 CarswellOnt 16340

- The employer attempted to retrieve recordings from a bus in the course of its investigation into a slip-and-fall claim – however, the relevant video recordings had been recorded over.
- In the course of looking at video evidence from the bus for a different date than the one on which the alleged slip-and-fall occurred, the employer discovered that the bus driver appeared to have tampered with the video camera, handled cash, and used a handheld device while at the wheel of the bus, all in contravention of his duties.
- In response, the employer imposed a three-day suspension on the driver and later sought to rely on the video evidence to justify the penalty.
- The Arbitrator found that the video surveillance evidence, and any other evidence that had been obtained through it, was inadmissible. The evidence had been obtained in violation of the collective agreement, which provided that all video cameras installed on the property was for "security purposes only."

British Columbia

The Personal Information Protection Act (PIPA)

- PIPA imposes obligations on employers in respect of the collection, use and disclosure of personal information. Specifically:
  - Employees must be advised that personal information is being collected;
  - The collection, use, or disclosure of personal information must be reasonable for the purposes of establishing, managing or terminating an employment relationship; and
  - The personal information that is collected, used or disclosed must be appropriate in the circumstances.
- PIPA states that consent is typically required for the collection of any personal information. However, there are limited exemptions for when consent may not be required, including:
  - If the employer is only collecting “employee personal information”;
  - It is reasonable to expect that the collection with the consent of the individual would compromise the availability or accuracy of the personal information, and the collection is reasonable for an investigation or proceeding; or
  - The collection is authorized by law.
- Exemptions are very narrowly construed.

British Columbia

Best practices for video surveillance initiatives per the BC OIPC

- The British Columbia Office of the Information and Privacy Commissioner (OIPC) states that a video surveillance policy is necessary for any employer seeking to implement video surveillance in the workplace. The policy should address:
    - The rationale and purpose of the surveillance;
    - When and how monitoring and/or recording will be in effect;
    - How recordings are used;
    - How long recordings will be retained;
    - How recordings will be deleted; and
    - A process for when there is unauthorized access or disclosure.
- It is also recommended that employees, or any person that may be captured on video be advised of the employer's video surveillance practices.

British Columbia

Video surveillance and grievance arbitration

- Labour arbitrators will weigh the employer's stated purpose(s) of the video surveillance practice against the employee's privacy interests to determine whether the policy is reasonable.
- This includes:
    - Whether the employer's need for video surveillance is bona fide;
    - Whether surveillance is implemented and utilized in a reasonable manner (i.e. the number and location of cameras);
    - Whether there are other reasonable alternatives; and
    - Any other relevant circumstances in each case.

Alberta considerations

Video surveillance and grievance arbitration

- Personal Information Protection Act (“PIPA”) governs the collection, use and disclosure of personal information by private-sector organizations in the province of Alberta.
- “Personal employee information” is defined to include personal information relating to an individual and reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating an employment or volunteer work relationship, but does not include personal information that is not about an individual's employment.
- Failure to comply with provincial or federal privacy legislation can lead to severe consequences for employers, including fines and potential lawsuits.

Alberta considerations

Video surveillance and grievance arbitration

- To determine whether the purpose of video surveillance is reasonable in accordance with section 15(1) of PIPA, courts and other decision-makers have adopted a balancing approach. In their analysis, they assess the following three factors:
    - Does a legitimate issue exist that the organization needs to address through surveillance?
    - Is the surveillance likely to be effective in addressing the legitimate issue?
    - Was the surveillance conducted in a reasonable manner?
- In addition, employers must:
    - Obtain consent from the individual to collect, use or disclose “personal information”, which means information about an identifiable individual; and
    - Provide reasonable notification to employees that their personal information will be collected and the reason for this collection.

Alberta – case study

Teamsters Local Union No. 987 of Alberta v Sobeys Capital Incorporated (Rocky View)

This labour decision emphasizes that employers must balance surveillance needs with employee privacy, using transparent, reasonable, and legally compliant practices to avoid legal like lawsuits or fines.

- **Issue**: Can Sobeys install surveillance cameras in an employee lunchroom, given that employees have no realistic alternative but to take their lunch and shift breaks in that lunchroom?
- **Outcome**: Video surveillance was deemed reasonable, but Sobeys was required to enhance transparency by informing employees of surveillance (e.g., signage, policy and handbook updates).

Quebec – case study

Syndicat des travailleuses et travailleurs de Hilton Québec v Innvest REIT (Hilton Québec), 2018 CanLII 112886 (QC SAT)

- The employer argued that workplace cameras were installed to ensure safety and prevent theft.
- The Tribunal concluded that the employer’s decision was justified under the circumstances, as the surveillance was deemed proportionate to the objective of ensuring security without infringing workers' rights unduly.
- The Tribunal also noted that the employees were informed about the surveillance, thus reducing the impact on privacy.

Jurisdiction issues

Arbitrator or Privacy Commissioner?

Eastmond v. Canadian Pacific Railway, 2004 FC 852

- Union sought to bring a complaint regarding the use of video surveillance to the federal privacy commissioner.
- The Federal Court found that an arbitrator did not have jurisdiction, exclusive or otherwise, to hear a complaint under the federal privacy legislation about the introduction of video surveillance in the workplace.
- No express language in the applicable collective agreement with respect to the use of video surveillance in the workplace.

Best practices

How to effectively implement and use video surveillance

Bargaining: negotiate the use of video surveillance into the collective agreement (but ensure the "purpose" of the surveillance is broad enough).

Notification: inform employees about the surveillance, except in situations where notice is not required under privacy legislation or the collective agreement.

Consideration of alternatives: take steps to document that less intrusive methods were explored and either implemented unsuccessfully or reasonably dismissed.

Best practices

How to effectively implement and use video surveillance

Minimization of privacy intrusion: take steps to reduce the impact on employees' privacy (i.e. only monitor in response to an incident).

Policy implementation: implement clear policies and practices ensuring compliance with privacy laws (if applicable) regarding the collection, use and sharing of video surveillance data.

Periodic assessment: document reviews of the need for ongoing video surveillance.

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Bargaining trends

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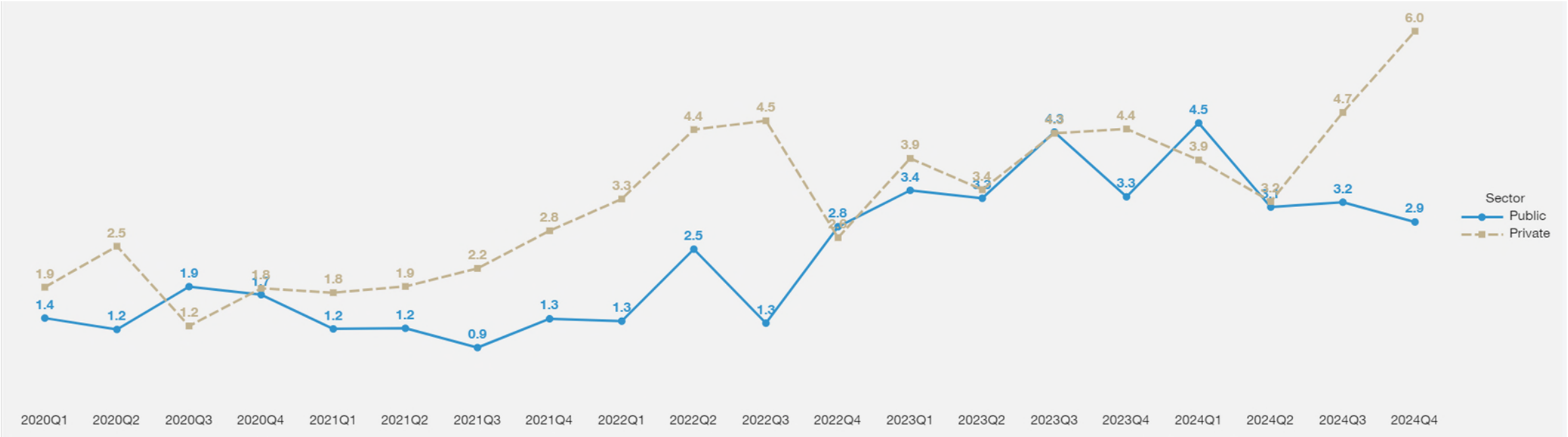
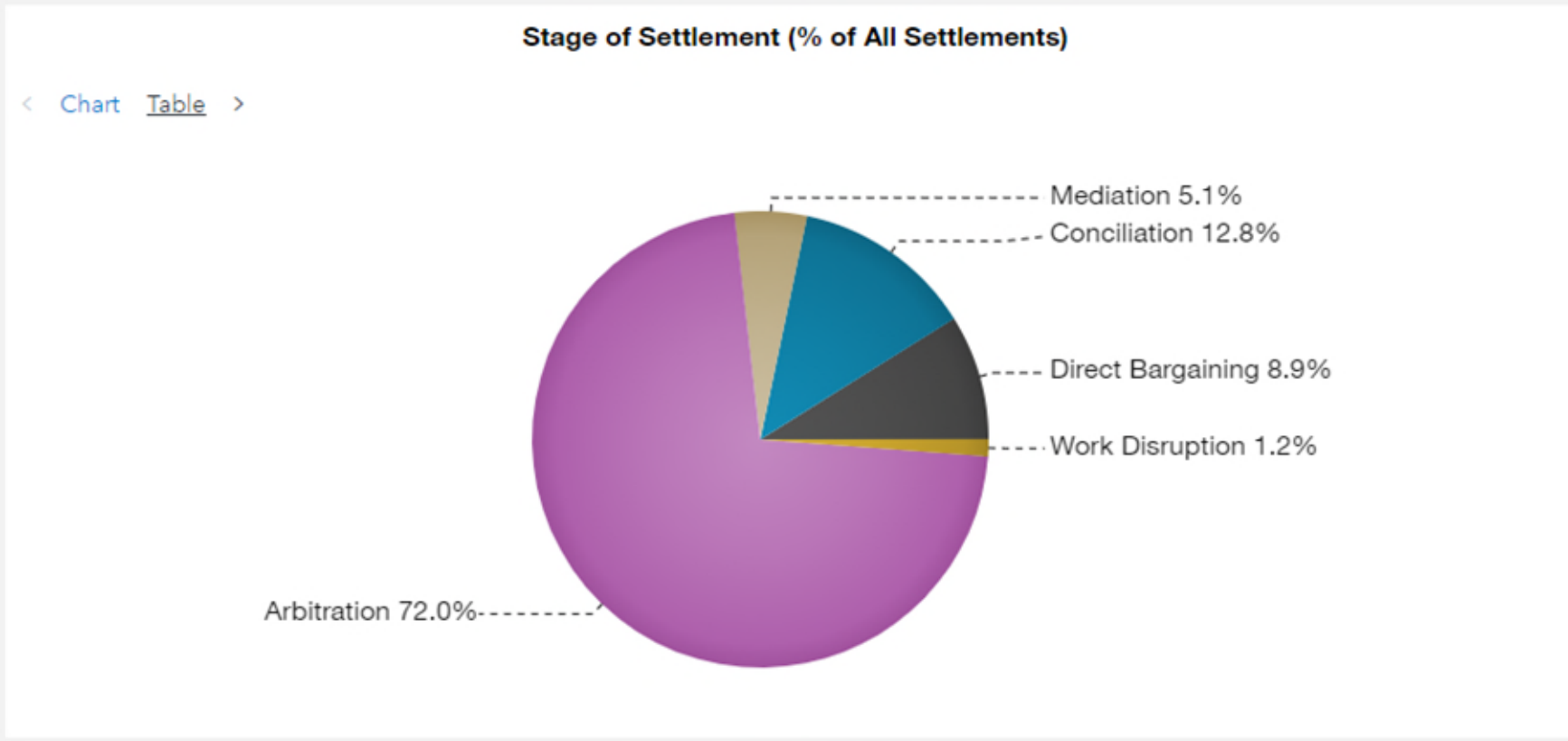
Wages, wages, wages

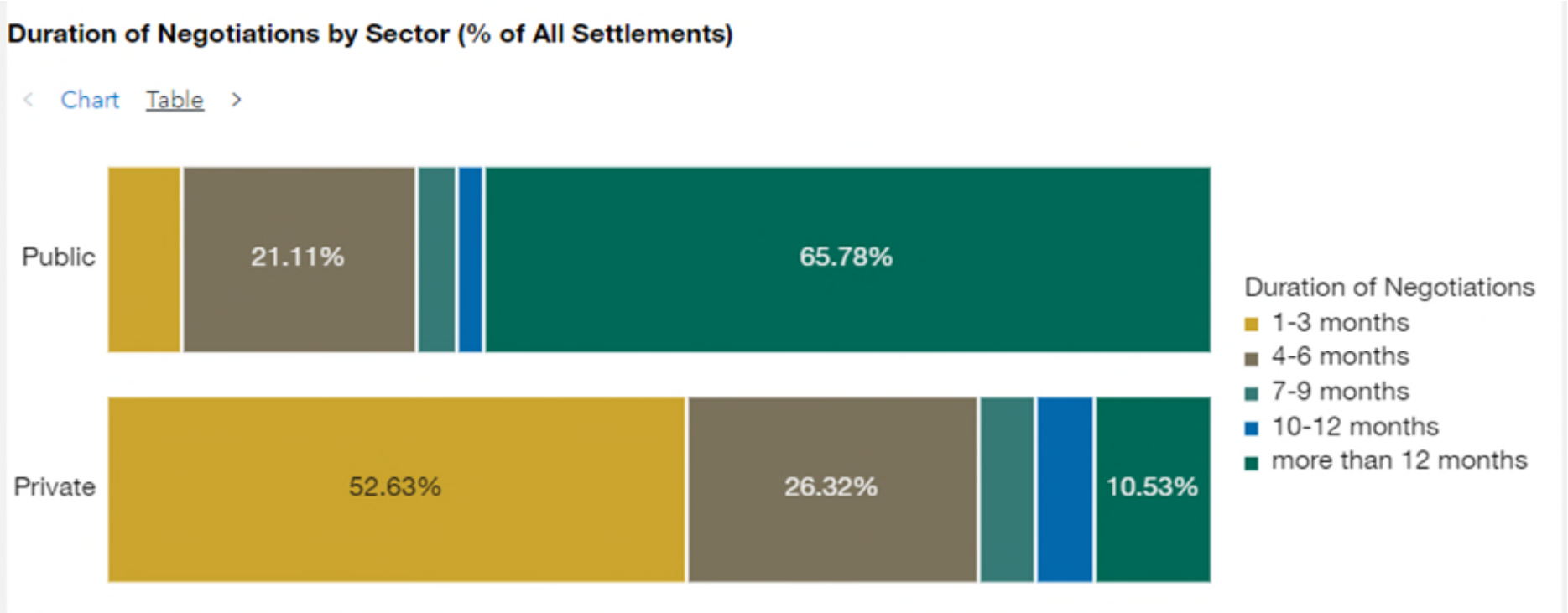
Wage increases in the public and private sector, 2020 - 2024



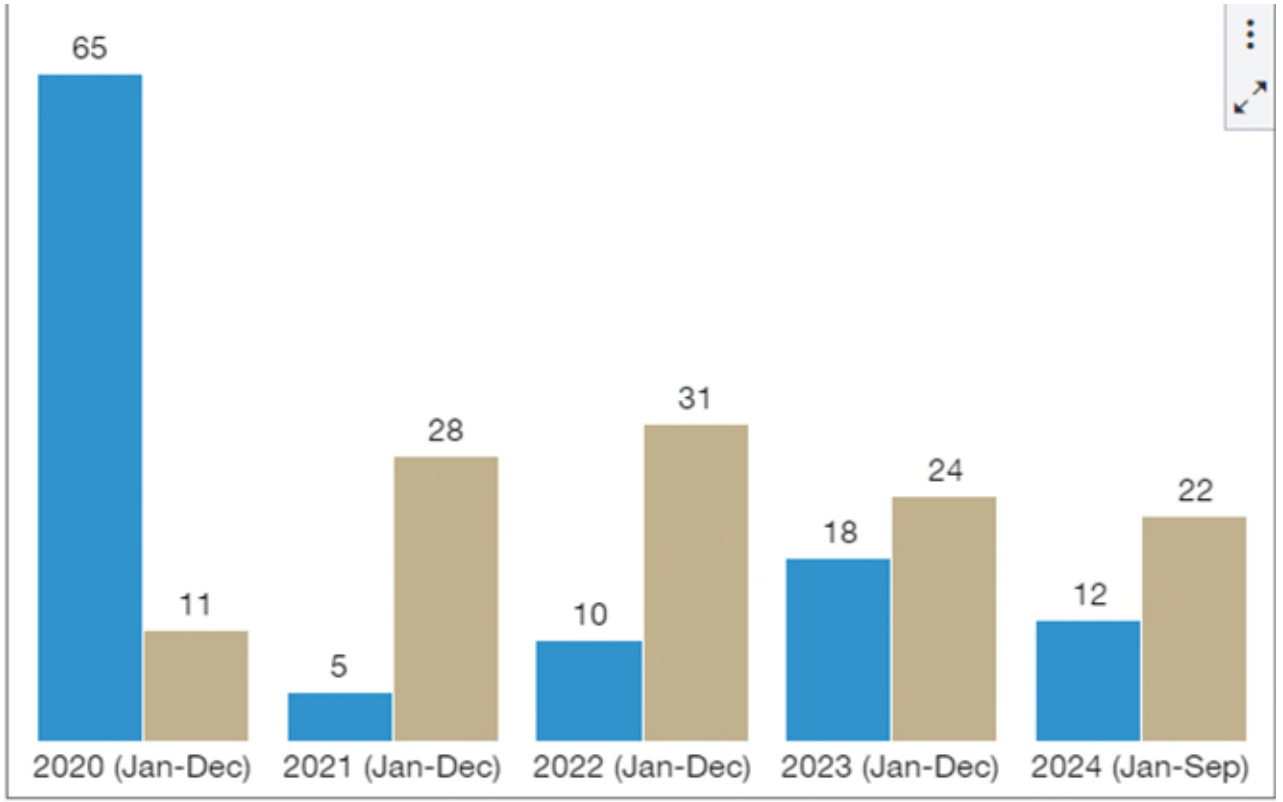
How were settlements reached in 2024?



How long did negotiations last in 2024?



How did work disruptions in 2024 compare?



A sneak peek

Next time:
April Kosten covers workplace drug testing in unionized environment.

***Power Workers' Union v. Canada (Attorney General),* 2024 FCA 182**

- Federal Court of Appeal upheld decision of the Federal Court that pre-placement and random alcohol and drug testing requirements, imposed by the Canadian Nuclear Safety Commission was constitutional and reasonable for safety-critical workers in nuclear industry, holding that the testing did not contravene Charter of Rights and Freedoms, and implementation was not unreasonable on administrative law grounds.
- Importantly, the federal court found workers in safety sensitive environments have a **diminished expectation of privacy** because of the nature of their work and the unique environment in which that work is being performed.

Thank you

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