

The Dentons logo, consisting 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 pattern of large, stylized leaves in shades of teal and blue.

# Dentons' 25th annual Ottawa employment law client appreciation webinar

September 11, 2024

Grow | Protect | Operate | Finance



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# What's new and exciting in employment law?

Catherine Coulter

# Another termination provision bites the dust

## *Dufault v. Township of Ignace (ONSC)*

- The court stated that one can't terminate an employee "at any time" under the ESA, because the ESA prohibits termination while someone is on protected leave and it also prohibits the termination of an employee who is reprimanded or retaliated against for trying to assert a statutory right.
- The better language in a termination provision may be:
  - Your employment may be terminated without cause upon providing you with...; or
  - Your employment may be terminated without cause in accordance with applicable law upon providing you with...

# On the better news front...

## *Egan v. Harbour Air Seaplanes (BCCA)*

Perhaps we should all live and work in British Columbia!

The termination provision was as follows: “The Harbour Air group may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the *Canada Labour Code*.”

Mr. Egan attempted to have the termination provision struck down on the basis that there was no limiting language such as that required in Ontario. In other words, in Ontario, the termination provision should have stated that Mr. Egan would receive “appropriate notice and severance in accordance with and limited to the minimum requirements of the *Canada Labour Code*.”

The Court stated that “disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable, is inconsistent with “[p]roper contractual interpretation that seeks to determine the true intentions of the parties...”.

# Vacation pay reminder

- Under Bill 149 (the *Working For Workers Four Act, 2024*), which received Royal Assent in Ontario on March 21, 2024, employers have been required to better document vacation payments since June 21<sup>st</sup>.
- A written agreement is required if an employer intends to pay vacation pay with any method other than as a lump sum payment prior to an employee's vacation time, which is the default vacation pay method under the ESA.
- Section 36(3) of the ESA also has new requirements around breaking down vacation pay in the pay statements that employees receive.

# More **Bill 149** reminders

- *Bill 149* has some new requirements in relation to job postings, but they still have not come into effect and we don't yet know when they will.
- The requirements are as follows:
  - Employers must include information about the expected compensation, or range of expected compensation for the job position.
  - Employers are prohibited from including requirements that job applicants have prior Canadian work experience.
  - Employers must disclose whether they use artificial intelligence to screen, assess or select job applicants. The criteria for what constitutes “artificial intelligence” will be prescribed by regulation, but we haven't seen the regulation yet.
  - Employers must retain copies of every publicly advertised job posting and associated application form for a period of three years after public access to the posting is removed.



# More bad news – Aggravated damages

- Aggravated damages are damages intended to compensate a terminated employee for a loss that they have suffered at the time of termination. There must be actual loss or damage which flows from unfair or bad faith conduct by the employer.
- Until now, medical evidence of mental distress or a diagnosable psychological condition was needed to support a claim for aggravated damages. Not any longer...
- The Ontario Court of Appeal upheld an award of \$50,000 in aggravated damages this year in the case of *Krmpotic v. Thunder Bay Electronics Limited*, simply on the basis of evidence of the plaintiff, his wife, and his son.
- Bad facts make for bad law (or good law in the case of employees). The court confirmed that employers have a duty of good faith and cannot act in an unfair, untruthful, misleading or unduly insensitive manner. Normal distress and hurt feelings are not compensable, but aggravated damages are available where the employer engages in conduct that is unfair or amounts to bad faith during the dismissal process by being untruthful, misleading or unduly insensitive, and the employee suffers damages as a consequence.



# More bad news – Aggravated damages, cont.

- In the case of *Koshman v. Controlex Corporation*, the Ontario Superior Court of Justice held that the employer's bad conduct in the two months preceding termination, could also result in an award of aggravated damages.
- This is contrary to the findings of the Supreme Court of Canada in the leading 1997 case of *Wallace v. United Grain Growers*, where it was clear that aggravated damages were only intended to compensate for bad behaviour by the employer at the time of termination.
- This case may be an aberration based on its horrible facts, which were deserving of punishment.

# General damages ramp up at the HRTO

- In the recent case of *L.N. v. Ray Daniel Salon & Spa*, the Human Rights Tribunal of Ontario awarded the complainant \$180,000 in general damages as a result of the discrimination, sexual harassment and sexual assault which she was subjected to at work.
- Most cases at the HRTO tend to cap general damages at about \$50,000, with the average range being \$10,000 to \$20,000.
- This case follows a 2018 decision of the HRTO, with similar facts, where the complainant was awarded \$200,000 in general damages.
- In short, where punishment is merited, the HRTO will punish with large damages awards.

# Today's take-aways

1. If you haven't paid attention to the new vacation requirements under Bill 149, now is the time to do so. The requirement to specify in writing how vacation pay will be paid, is now in effect. This is also a good time to get your house in order in terms of otherwise making sure that you're dealing with vacation pay entitlements correctly, including paying vacation pay on commissions and incentive bonuses as required under the ESA.
2. If you haven't double-checked your termination provisions lately, make sure that you don't have any termination "at any time" or "for any reason" language. And make sure that you're checking all of your termination provisions (including probationary clauses and termination for cause provisions), as well as termination provisions in commission and incentive bonus policies and option plans.
3. Think ahead about the upcoming new job application requirements, even though we don't yet have full details from the government.



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# The do's and don'ts of PEOs

Maggie Sullivan

# What is a PEO and what does a PEO do?

- PEO stands for “**Professional Employer Organization**”
- A PEO is an organization to which business can outsource an array of human resource responsibilities, such as:
  - Payroll processing;
  - Benefits administration;
  - Tax filing;
  - Hiring, onboarding, and training;
  - Statutory entitlements;
  - Employment contracts and other documents; etc.
- PEOs may contract to become the “employer of record” of their clients’ employees, or at least a co-employer of those employees.

# Potential benefits of using a PEO

Benefits often advertised on the websites of PEOs:

1. Using a PEO can free up time valuable time for organizations.
2. PEOs can ensure accurate and compliant employee management and operations.
3. PEOs can provide organizations with access to a broad array of benefits plans that they may not ordinarily have access to.

Statistics from the National Association of Professional Employer Organizations:

- Businesses in a PEO arrangement grow 7-9% faster, have 10-14% lower turnover, and are 50% less likely to go out of business.



# However, be aware of the risks of using a PEO...

The contracting business will remain the employer of its employees

- As previously noted, PEOs may contract to become the “employer of record” of their clients’ employees, or at least a co-employer of those employees.
- However, the ESA defines “employer” as:

“an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it...”.
- That obligation cannot be removed by way of a contract with a PEO or other “employer of record”. It exists as a matter of basic law.

# However, be aware of the risks of using a PEO...

Why does the contracting business' employer status matter?

- While PEOs may purport to be experts in Canadian employment law, errors or misunderstandings may arise.
- **Compliance is not guaranteed.**
- Accordingly, if employment laws are not followed, liability will fall to the PEO's client.
- Further, a PEO's service agreement with their clients may include extensive indemnities to protect the PEO from such liability.

# Takeaways

- As PEOs become more widely adopted in other jurisdictions, we can perhaps expect increased attention by Canadian legislators.
- To date, we have not seen any litigation in Canada involving liability against an organization in the context of a PEO arrangement.
- It will always be important to speak with Canadian legal counsel before engaging with a PEO, and to have Canadian counsel review any proposed service agreements and employment documents.
- In the current legal landscape and given the potential for compliance issues as it concerns abiding by employment standards legislation, PEOs may be best used for benefits administration and payroll processing for Canadian organizations.



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# Navigating employment issues in earn-out disputes: Key considerations for employers

Fraser Mackinnon Blair

# What are earnouts?

- Contractual provision tying a portion of the purchase price of a “Target Company” to the post-acquisition performance of the Target.
- A form of deferred (and potentially additional) consideration.
- Payable to shareholder-employees who remain employed by Target post-closing.

## Common Milestones:

- EBITDA/Revenue/Earnings per share threshold.
- Customer acquisition thresholds.

# When are earnouts used?

- Where key employees who are also shareholders continue to work with the Target Company post-acquisition (small/medium sized private companies).
- Where Target Company has little track record of success or is deploying new products/technology.
- Disagreement over method of valuating Target Company.



# Employment-related earnout terms

- A. Continued employment a condition to earnout payment.
- B. Termination for cause and/or resignation may result in forfeiting right to earnout.
- C. Tax consequences: is earnout payment treated as income or as a capital gain?

# Acceleration clause

- Where full or substantial portion of earnout is due in full upon the occurrence of certain events (e.g. w/o cause termination of shareholder/employee of the Target Company).
- Protection for seller = increasingly difficult to negotiate with buyers.
- Examples of Terms:
  - A. *If employment of a “Seller Member” is terminated by Buyer without cause or good reason, Seller Member may accelerate their payment of their portion of the then remaining earn-out, and Buyer required to pay same within 15 days.*

# Case law examples

## *Pacira Biosciences, Inc. et al v. Fortis Advisors LLC et al (Delaware)*

- How earnouts interact with the duty of good faith/honest contractual performance.
- Earnout Terms:
  - A. Buyer to pay up to \$50 million to the “Earnout Participants”, subject to Target Company achieving certain revenue thresholds related to specific drug.
  - B. Earnout to be paid at any time post-closing, but amount reduced over time.
  - C. Buyer required to operate Target Company in good faith and to use commercially reasonable efforts to achieve the milestones.

# Case law examples

## *Pacira Biosciences, Inc. et al v. Fortis Advisors LLC et al (Delaware)*

- Plaintiff alleged that communications from Earnout Participants were intended to achieve the minimum threshold necessary to trigger the earnout payments.
- Breach of duty of good faith and honest performance.
- Holding: No breach. No prohibition on communications from Earnout Participants to Target Company in acquisition agreement.
- Upshot: Court unlikely to read restrictions on conduct into earnout provisions that are not specifically bargained for.

# Case law examples

## *Shedletsky v. EQ Advertising (2022 ONCA 619)*

- Founders sold shares in Target Company to EQ in exchange for shares of EQ and payment of up to \$1.4 million through earnout mechanism.
- EQ agreed to employ founders post-closing. Employment agreements provided that Eric and Jed would continue as employees of EQ for two years.
- Acceleration Provision: half the total earnout payable if Eric or Jed terminated without cause.
- Termination Provision: an unprofitable quarter post-closing=grounds to terminate for cause.



# Case law examples

## *Shedletsky v. EQ Advertising (2022 ONCA 619)*

- Eric furloughed in March 2020 on account of economic conditions, but expressly not terminated.
- Eric claims constructive dismissal in April 2020.
- In June 2020, EQ purports to terminate Eric pursuant to the Unprofitable Quarter Provision.
- Holding (ON CA): Original furlough governs; Eric entitled to Acceleration Provision.
- Upshot: No do-over available for employer.

# Word of caution

## *Waksdale v. Swegon*

- Para 10: “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.”
- Para 14: “A severability clause cannot have any effect on clauses of a contract that have been made void by statute: *North v. Metaswitch Networks Corp.*, [2017 ONCA 790, 417 D.L.R. \(4th\) 429](#) (Ont. C.A.), at para. 44. Having concluded that the Termination for Cause provision and the Termination of Employment with Notice provision are to be understood together, the severability clause cannot apply to sever the offending portion of the termination provisions.”
- Upshot? Separate earnout provisions from termination clause and ensure termination clause complies with the *ESA*.

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**BREAK**

We will resume at 10:05 a.m.

Next up:

**Accessibility**



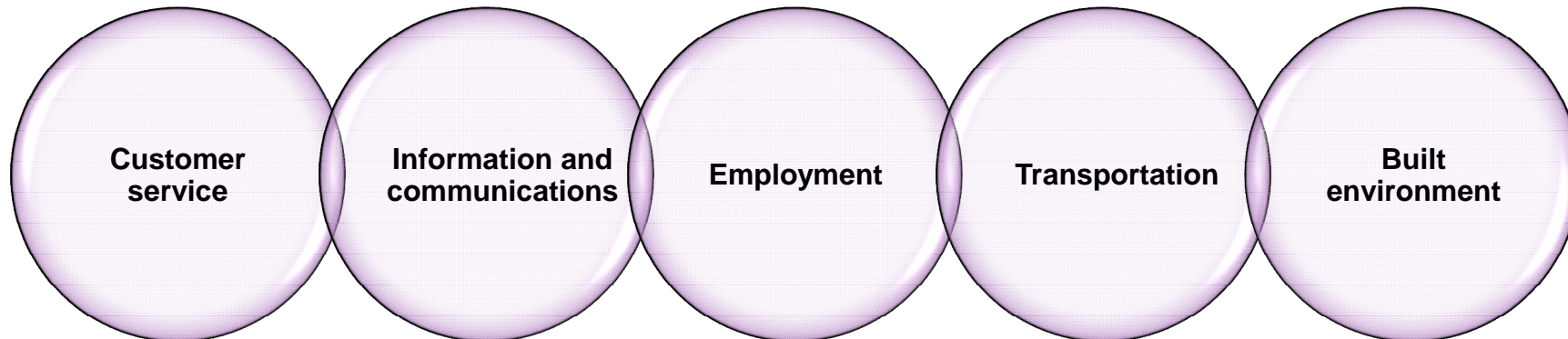
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# Accessibility

Julia Dales

# ***Accessibility For Ontarians With Disabilities Act, 2005 (AODA)***

- Goal of the AODA was for Ontario to be fully accessible by 2025.
- AODA set out accessibility standards for:



- The standards are set out in the Integrated Accessibility Standards Regulation (IASR).
- Organization's obligations under AODA depend on number of employees.



# 1-19 Employees (“Small Organizations”)

## Obligations:

- Accessibility policy including accessible customer service plan
- Training
- Accessible feedback process
- Accessible emergency response information, if applicable
- Provide accessible information on request
- Individualized emergency response procedure
- Notification in recruitment and offers of employment of availability for accommodation
- Notice of temporary disruption
- Take accessibility needs into account during employment (accommodation, performance management, redeployment, career development)
- Physical space accessibility (parking, service counters, waiting areas, queues)

# 20-49 employees

Obligations:

- **Everything in prior slide plus**
- File compliance report every 3 years, only regarding customer service accessibility (last filing due date was **December 31, 2023**).

# 50+ Employees (“Large Organizations”)

Obligations:

- **Everything in prior slide plus:**
- File compliance report every 3 years
- Publicly available Statement of Organizational Commitment
- Publicly available Multi-Year Accessibility Plan (review/update every 5 years)
- Documented individual accommodation plans
- Return to work process
- Website published **after Jan 1, 2012** must conform with WCAG 2.0 Level A & AA (except live video captioning and pre-recorded video audio descriptions).

# Summary of obligations for large organizations

|                                               |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>General</b></p>                         | <ul style="list-style-type: none"> <li>• Training</li> <li>• Publicly available Statement of Organizational Commitment</li> <li>• Publicly available Multi-Year Accessibility Plan (review/update every 5 years)</li> <li>• File compliance report <b>every 3 years</b> (latest due date was <b>Dec 31, 2023</b>)</li> <li>• Accessibility policy including accessible customer service plan</li> </ul>                  |
| <p><b>Employment</b></p>                      | <ul style="list-style-type: none"> <li>• Individual accommodation plans</li> <li>• Return to work process</li> <li>• Individualized emergency response procedure</li> <li>• Notification in recruitment and offers of employment of availability for accommodation</li> <li>• Take accessibility needs into account during employment (accommodation, performance management, redeployment, career dev.)</li> </ul>      |
| <p><b>Information/<br/>Communications</b></p> | <ul style="list-style-type: none"> <li>• Website published <b>after Jan 1, 2012</b> must conform with WCAG 2.0 Level A &amp; AA <b>Customer service</b></li> <li>• Accessible customer service plan</li> <li>• Accessible feedback process</li> <li>• Accessible emergency response information, if applicable</li> <li>• Provide accessible information on request</li> <li>• Notice of temporary disruption</li> </ul> |
| <p><b>Design of public spaces</b></p>         | <ul style="list-style-type: none"> <li>• Physical space accessibility (parking, service counters, waiting areas, queues)</li> </ul>                                                                                                                                                                                                                                                                                      |

# AODA training

- Must train anyone who is an employee or volunteer of the organization, who participates in development of organization's accessibility policies, or provides goods or services on behalf of organization.
- Large organizations must document dates training provided, and number of individuals trained.
- Training must be appropriate in light of individual's duties and cover:

1. Disability provisions in the *Human Rights Code*; and

2. Interacting with persons with various types of disabilities and persons who may use a support animal or have a support person, how to use assistive devices on premises, and what to do if someone is having difficulty accessing organization's goods/services.



# Penalties for non-compliance

Inspections

Order to comply

Administrative  
penalties  
(\$500 - \$15,000 daily  
for corporations  
dependent on impact  
and contravention  
history)

Criminal  
prosecution  
(fines up to \$100,000  
daily for corporations)

# Accessibility across Canada

| Jurisdiction                     | Status of Accessibility Legislation                                           |
|----------------------------------|-------------------------------------------------------------------------------|
| Manitoba                         | In force with accessibility standards                                         |
| Nova Scotia                      | In force – standards in development                                           |
| Quebec                           | In force – applies only to public sector                                      |
| British Columbia                 | In force – standards in development – currently applies only to public sector |
| Alberta and Prince Edward Island | No general accessibility statute                                              |
| Newfoundland and Saskatchewan    | In force – standards in development                                           |
| New Brunswick                    | Proposed                                                                      |

# **The *Accessible Canada Act & Regs* (federally regulated organizations)**

- Exemptions for organizations with less than 10 employees.
- Specific standards are in development / draft form.
- Current general requirements:
  - Prepare and publish accessibility plans (update every three years) in consultation with persons with disabilities.
  - Establish feedback process.
  - Providing accessible formats on request in prescribed time.
  - Prepare and publish progress reports.

# The Accessible Canada Act & Regs (federally regulated organizations)

Accessibility plans should include:


- Mandatory headings (“General”, Headings re: Section 5 of the Act, “Consultations”).
- **General:** Position/title of individual who receives feedback & how public can communicate with organization.
- **Section 5 headings:** employment, built environment, information and communication technologies (ICT), communication other than ITC, procurement, design/delivery of goods and services, transportation:
  - Organization’s policies, programs, practices and service relating to identification/removal of barriers and prevention of same.
  - Any actions taken to remove barriers or plans on how that will be achieved.
  - Any training provided to employees.
- **Consultations:** Explanation of how persons with disabilities were consulted in creation of plan.

# The Accessible Canada Act & Regs (federally regulated organizations)

Deadlines and other requirements:

- Large organizations (100+ employees) must have published by **June 1, 2023** (so must publish first progress report in **2026**).
- Small organizations (10-99 employees) must have published by **June 1, 2024**.
- Notify Accessibility Commissioner within **48 hours** when Accessibility Plan or Progress Report has been published.
- Plan and Progress reports must be published in compliance with WCAG Level AA and be provided in accessible format on request within **15 days** (small orgs) days or **20 days** (large orgs) but **45 days** for braille or audio formats.
- Retain plans/reports/feedback processes for **7 years**.



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# Practical advice regarding employment issues impacting the Chief Executive - Board of Directors relationship

Colleen Hoey

# Overview

1. Personal liability risks for Board members
2. Whose lane is it anyway?
3. Harassment complaints involving the Board and/or the ED
4. When change is needed

# Personal liability of directors

## Employment Law as a source of potential liability

| Source                                | Type of liability                                                                                                                        |
|---------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Employment Standards Act, 2000</i> | Directors of an employer are jointly and severally liable for:                                                                           |
| 81 (1) (a) – (d)                      | Unpaid wages – up to six months                                                                                                          |
| 81 (4)                                | Unpaid vacation pay – up to 12 months                                                                                                    |
| 81 (5)                                | Unpaid holiday pay                                                                                                                       |
| 81 (6)                                | Unpaid overtime wages                                                                                                                    |
| 136 – 137                             | Failure to comply with an order by an ESA officer or order affirmed by the Board. Permitting an offence.                                 |
| <i>Workplace Safety Insurance Act</i> | Officers or Directors who knowingly authorize or permit an offence under the Act is guilty of an offence. Penalty. Fine or imprisonment. |

# Personal liability of directors

## Employment law as a source of potential liability

| Source                                           | Type of liability                                                                                                                                                                                                                    |
|--------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Ontario Business Corporations Act, s. 131</i> | Directors of an employer are jointly and severally liable for” up to six months of wages and 12 months of vacation pay if the corporation is sued and debt is unsatisfied, or the corporation is involved in insolvency proceedings. |
| <i>Occupational Health and Safety Act, s.32</i>  | Obligation to take all reasonable care that Directors and Officers comply with the Act and its regulations – Fines/Imprisonment.                                                                                                     |
| <i>Income Tax Act. s 227. 1(1)</i>               | Directors of the corporation are jointly and severally liable where the corporation has failed to deduct or withhold an amount under the act (EI, CPP, GST source deductions).                                                       |

# Whose lane is it?

Board of Director's oversight role can necessarily create tension.

## Tools:

- Onboarding process for Board members.
- Take the time to define roles, tasks, expectations (Board members and ED).
- Establish an evaluation process for ED upfront.
- Invest the time to develop a culture that allows for debate and difficult discussions but sets rules around what type of behaviour is unwanted.
- Develop conflict resolution process.



# Harassment complaints

## Two key types of complaints that will concern the board:

- Complaint by staff against ED;
- Complaint between ED and Board.

## Considerations:

- Protecting the individuals;
- Protecting the process (conflict of interest/ confidentiality);
- External supports;
- Protecting org during the complaint process;
- Outcomes;
- **Prevention:** Harassment Policy and Training.

# When change is needed


Best practice

Employment  
contract

Bring counsel in  
early

Consider  
working notice

Communication

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# Accommodation elevation: Strategies for dealing with tough accommodation issues

Stephanie Lewis

# Accommodations – The Advanced Class

How to deal with some of the toughest accommodations issues in the workplace

**What to do?**

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graph LR; A[What to do?] --- B[Health issues that are raised for the first time during performance management.]; A --- C[An employee wants to return to work for financial reasons even though they do not have medical documentation confirming they are medically fit to return to work.]; A --- D[The medical documentation provided by an employee is insufficient or does not make sense.]; A --- E[Accommodation requests are made based on invisible injuries (like mental health issues).]; A --- F[Attempts to accommodate have been ongoing for a long time and do not appear to be working.];
```

Health issues that are raised for the first time during performance management.

An employee wants to return to work for financial reasons even though they do not have medical documentation confirming they are medically fit to return to work.

The medical documentation provided by an employee is insufficient or does not make sense.

Accommodation requests are made based on invisible injuries (like mental health issues).

Attempts to accommodate have been ongoing for a long time and do not appear to be working.

# How to address health issues that are raised for the first time during performance management?

## IMMEDIATE RESPONSE

Conclude the meeting and temporarily put performance management on hold.

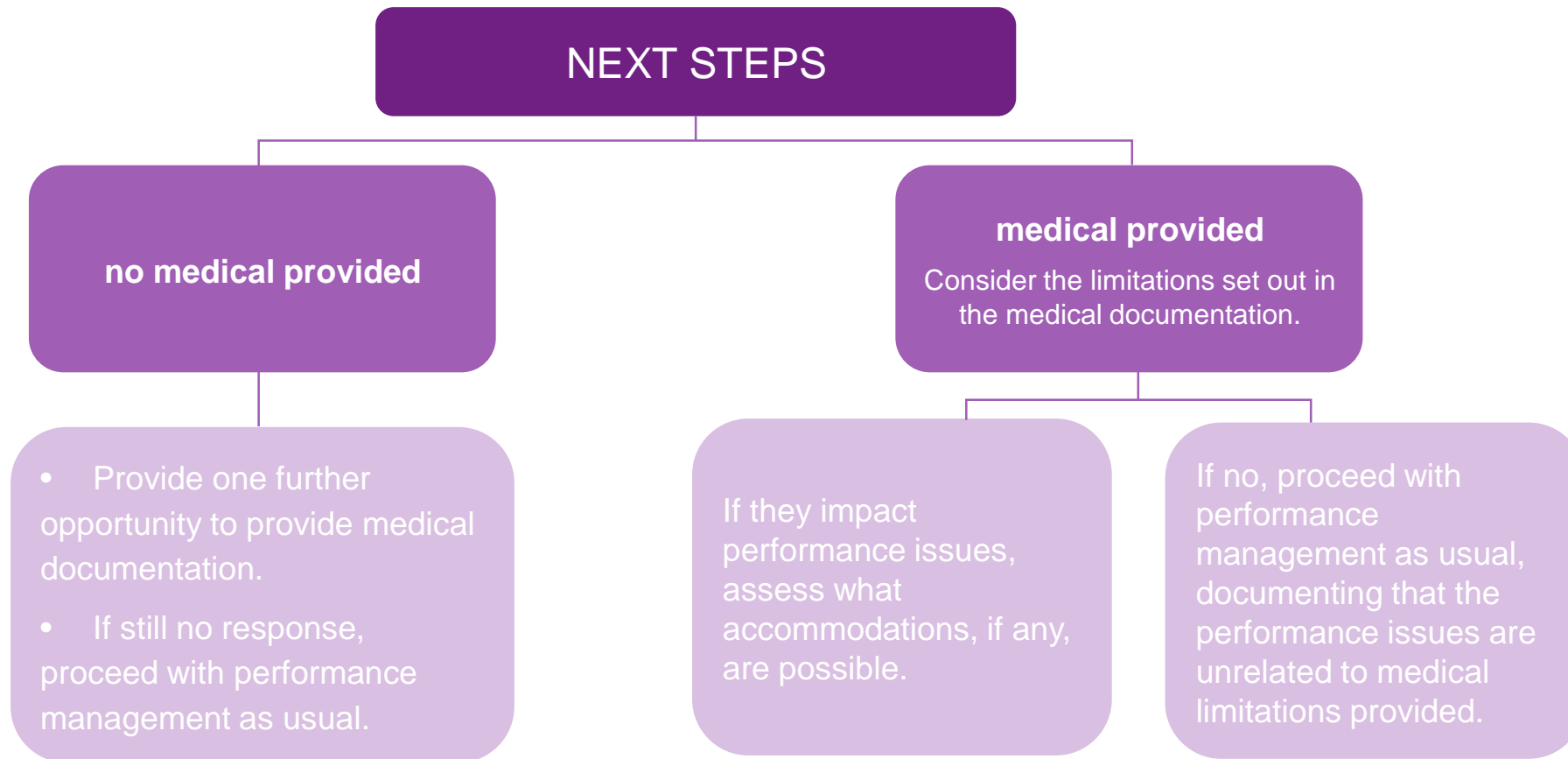
Confirm in writing that this is the first time the employee has raised health issues impacting their performance and that the company takes its duty to accommodate seriously.

Request the employee for medical documentation.

\* questionnaire recommended

Provide a deadline for response.

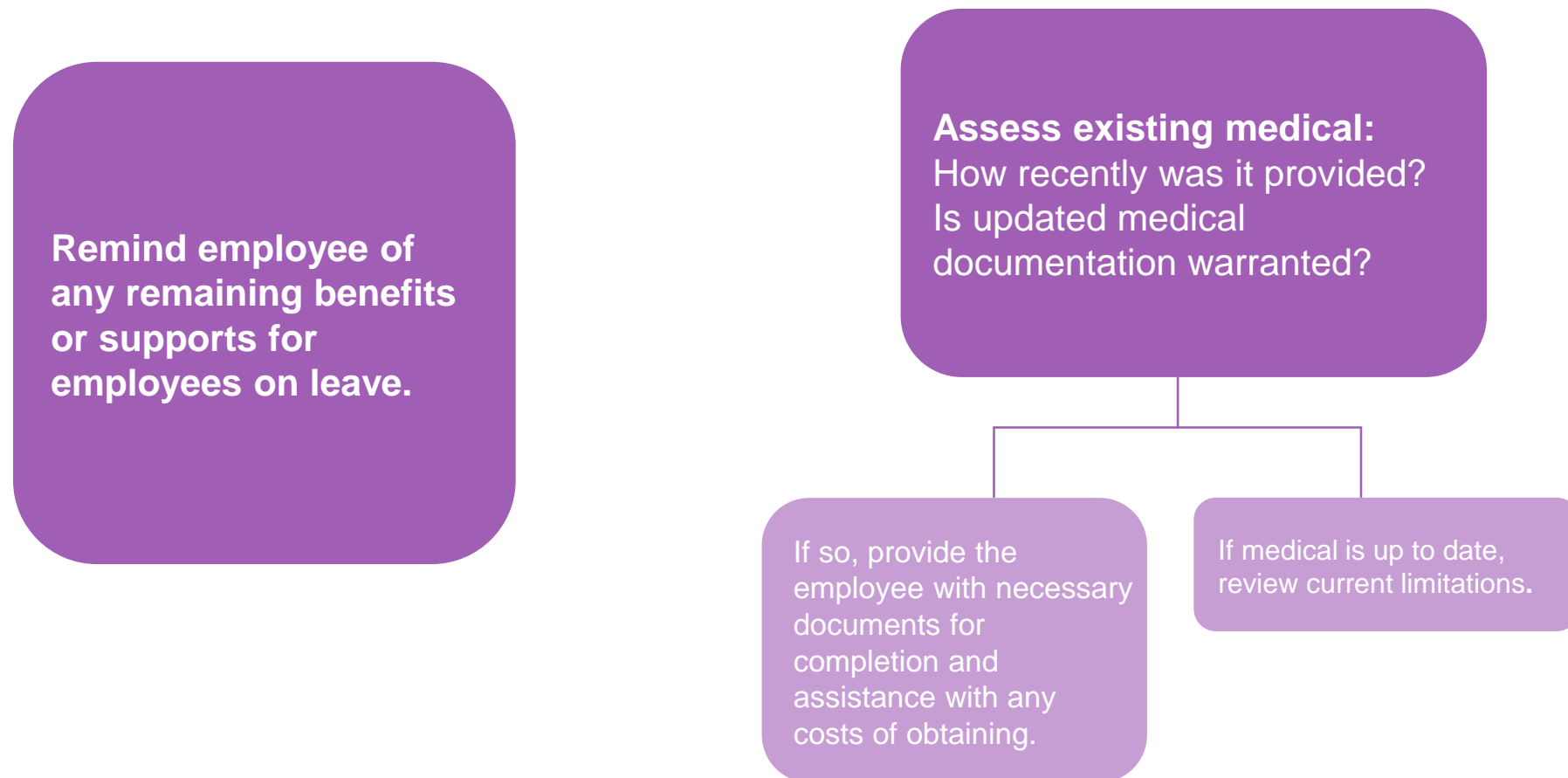
# How to address health issues that are raised for the first time during performance management?



**! Document everything**



# How to deal with an employee who wishes to return to work for financial reasons when not medically fit to do so?



# How to deal with an employee who wishes to return to work for financial reasons when not medically fit to do so?

**If up to date medical documentation indicates the employee is not fit for work:**

- The employee cannot safely return and should not be allowed to do so.
- Advise employee of EI sick benefits.
- Provide any requested assistance with accessing benefits forms.

# How to deal with medical documentation provided by an employee that is incomplete or does not make sense?

## Commonly encountered examples:

- Medical that contradicts recent medical from same practitioner.
- Medical that attempts to impose the form of accommodation instead of addressing the health limitations.
- Medical that does not respond to the questions asked.
- Medical that is illegible.

# How to deal with medical documentation provided by an employee that is incomplete or does not make sense?

## Next Steps

1. Determine what supports, if any, can be temporarily put in place based on the medical provided.
2. Follow up and request further information from the medical practitioner and provide a deadline for response.
3. Assess the updated response.

# How to deal with accommodation requests based on invisible injuries?

## What are invisible injuries?

- Physical, mental, or neurological condition that is not visible from the outside.
- Include traumatic brain injuries, mental health issues or pain symptoms.
- Despite being invisible, they can limit or challenge a person's movements, senses or activities.

# How to deal with long term accommodations?

**Short Answer:** *The same way you deal with other medical accommodation requests.*

1. Get supporting medical documentation.
2. Assess supporting medical.
3. Determine what, if any, accommodations can be made up to the point of undue hardship.
4. Periodically seek updated medical information to confirm ongoing need for accommodation.

# How to deal with long term disabilities & accommodations?

## A.K.A. How long does the duty to accommodate last?

**Short Answer:** As long as the employee remains employed, there is a duty to accommodate them up to the point of undue hardship.

### Relevant considerations:

- Is the employee capable of doing any work?
- If the employee has been completely unable to do any work, how long have they been on leave? (Does frustration of contract apply?)
- Is the employer federally regulated? If so, is the injury a work-related injury?

**Best practices for dealing with long term medical leaves.**



# Thank you



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