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Changes to Canadian employment & labour law:

2020 year in review, looking forward to 2021

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Articles

Introduction

2020 will be remembered as the year that changed the workplace forever.

Offices became kitchen tables; meeting rooms transformed into computer screens; international travel was banned; and governments introduced a steady stream of programs to help employers navigate through the uncertainty caused by COVID-19.

Amidst all the chaos it would have been easy to overlook the non-COVID-19 case law and legislative developments that happened this year and will significantly impact Canadian employers in 2021 and beyond. Changes in the law related to employment contracts and termination clauses; new employment standards; and enhanced workplace violence and harassment policies are just some of the things that employers will need to grapple with in the next normal.

This toolkit provides a recap on the year that was in Canadian employment and labour law and sets the stage for what's to come in 2021. We hope you find this material useful.

As always, if you have any questions regarding the content or have an employment-related query, please do not hesitate to contact any member of our Dentons Canada Employment and Labour Team.

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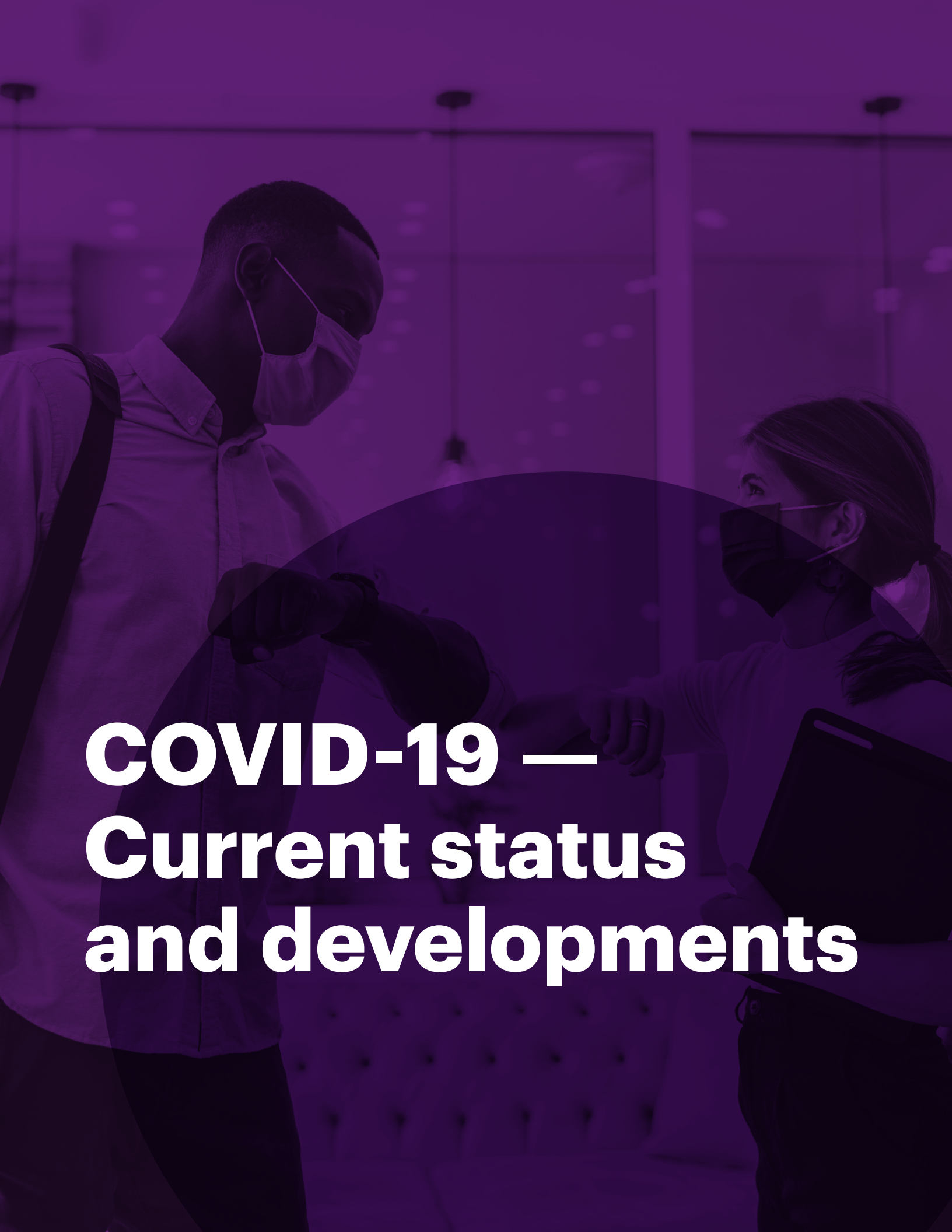

COVID-19 — Current status and developments

As we have seen over the past year, provincial requirements are ever-changing.

As we move towards a new dynamic involving lockdowns and face masks, it is now more important than ever for organizations to position themselves so they can respond to change quickly and effectively. Staying on top of provincial and federal requirements is vital for any business.

Please click on the links below for up-to-date information on the current requirements.

Provincial workplace mask requirements from coast to coast

Provincial workplace face mask requirements

The latest on provincial lockdowns

Overview of provincial lockdowns

Workplace screening requirements from coast to coast

Overview of workplace screening requirements

The latest developments on Canada's travel restrictions and self-quarantine requirements

Canada's COVID-19 travel restrictions and self-quarantine requirement were originally implemented in March 2020, and will likely remain in place for at least the first quarter of 2021. The current version of each Order-in-Council (OIC) may be viewed here:

- *OIC 37 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* (the Canada-US Order). The Canada-US Order prohibits **foreign nationals** from entering Canada from the United States if they seek to enter for an **optional or discretionary purpose**.
- *OIC 35 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country other than the United States)* (the International Order). The International Order prohibits **foreign nationals** from entering Canada from any country other than the United States, unless the foreign national: (1) qualifies under a specifically enumerated exemption, and (2) seeks to enter for a purpose that is not **optional or discretionary**.
- *OIC 36 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation) No. 8* (the Self-Quarantine Order). The Self-Quarantine Order requires **every person** (including Canadian citizens and permanent residents) to quarantine for a period of 14 days, unless a specific exemption applies.

The above Orders-in-Council have undergone several revisions and now contain many additional exemptions that were not available when they were first implemented. A few of the most recently added exemptions are discussed below.

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Family-based exemptions

When the Canada-US Order and the International Order were first implemented, an exemption was only provided for an "immediate family member" of a Canadian citizen or permanent resident. "Immediate family member" means: (a) the spouse or common-law partner of the person; (b) a dependent child of the person or their spouse/common-law partner; (c) a dependent child of the dependent child referred to in item (b); (d) the parent or stepparent of the person or their spouse/common-law partner; or (e) the guardian or tutor of the person. An exemption from the travel restrictions as an immediate family member does not require advance written authorization.

There is now an additional family-based exemption to the Canada-US Order and the International Order for an "extended family member" of a Canadian citizen or permanent resident. "Extended family member" means: (a) an individual (18 years of age or older) who is in an exclusive dating relationship with the person (also 18 years of age or older), has been in such a relationship for at least one year, and has spent time in the physical presence of the person during the course of the relationship; (b) a dependent child of the person referred to in item (a); (c) a child of the person or their spouse/common-law partner or the person referred to in item (a) other than a dependent child (i.e., adult children); (d) a dependent child of the child referred to in item (c); (e) a sibling, half-sibling or step-sibling of the person or their spouse/common-law partner; or (f) a grandparent of the person or their spouse/common-law partner. An exemption from the travel restrictions as an extended family member requires advance written authorization from Immigration, Refugees and Citizenship Canada.

Student exemptions

When the Canada-US Order and the International Order were first implemented, international students were exempt from the travel restrictions, so long as they held a valid study permit, or had been approved for a study permit (prior to noon EDT on March 18, 2020) that had not yet been issued. They were also required to demonstrate that at least some portions of their academic program that could not be performed remotely.

The exemption for international students has been amended recently. In order to qualify for an exemption from the travel restrictions, the international student must now: (a) hold a valid study permit; (b) be eligible to apply for a study permit when entering Canada; or (c) have received written approval for a study permit that has not yet been issued. In addition, the international student must have been approved to attend a Designated Learning Institution (DLI) with a COVID-19 readiness plan approved by their province or territory.

An international student will also qualify for an exemption to the Self-Quarantine Order if he or she: (a) is enrolled at a DLI with a COVID-19 readiness plan, (b) attends such an institution regularly, and (c) enters Canada to go to that institution. A driver who enters Canada in order to drop off or pick up a student enrolled at a DLI with a COVID-19 readiness plan will also be exempt from the Self-Quarantine Order, so long as the driver does not leave the vehicle, except to escort the student to or from that institution (and must wear a mask or face covering if they do).

A parallel exemption to the Self-Quarantine Order will apply to a student who is enrolled at an educational institution in the United States, so long as the student: (a) attends that institution regularly, and (b) enters Canada in order to return to their habitual place of residence after attending that educational institution. A driver who enters Canada after dropping off or picking up a student enrolled at an educational institution in the United States will also be exempt from the Self-

Quarantine Order, so long as the driver does not leave the vehicle, except to escort the student to or from that institution (and must wear a mask or face covering if they do).

Compassionate grounds exemptions

The Canada-US Order and the International Order have recently been amended to exempt foreign nationals who intend to enter Canada to:

- Attend to the death of or provide support to a Canadian citizen, permanent resident, temporary resident, protected person, or registered Indian who is residing in Canada and who is deemed by a licensed health care practitioner to be critically ill;
- Provide care for a Canadian citizen, permanent resident, temporary resident, protected person, or registered Indian who is residing in Canada and who is deemed by a licensed health care practitioner to have a medical reason that they require support; or
- Attend a funeral or end of life ceremony.

Foreign nationals entering Canada for the above reasons may also be granted an exemption from the Self-Quarantine Order on a limited basis. If an exemption is granted, the may leave their place of self-quarantine only for purposes of attending to their pre-approved "compassionate" activities.

An exemption from the travel restrictions and/or self-quarantine requirement on compassionate grounds requires advance written authorization from the Public Health Agency of Canada.

Alberta International Border Testing Pilot Program

The Province of Alberta recently implemented a pilot program at Calgary International Airport and the Coutts land border, which allows international travelers to significantly reduce the 14-day period of self-quarantine. The pilot program is not available to international travelers who: (a) are symptomatic at the time of entry to Canada, have been in contact with a confirmed COVID-19 case in the last 14 days, or do not have an acceptable quarantine plan, (b) will travel to other provinces (participants must remain in Alberta during the 14-day period, unless departing Canada directly from Alberta), or (c) arrive on domestic flights into Calgary International Airport (e.g., an international traveler who arrives in Vancouver and takes a connecting flight to Calgary).

In order to participate, international travelers must follow an extensive procedure. The pertinent requirements include: (a) taking a COVID-19 test on-site (only available to individuals at least four years of age); (b) remaining in self-quarantine until the test results are received by email (approximately 48 hours); (c) if the result is negative, they may leave quarantine but must follow all required preventative measures, including daily check-ins; and (d) taking a second COVID-19 test at a participating pharmacy on the sixth or seventh day. Participants are prohibited from visiting certain settings for varying periods of time, depending on the setting.

Edmonton Airport is expected to be added to the pilot program in early 2021. The Province of Ontario has also expressed an interest in having Pearson International Airport and its land ports of entry participate in the pilot program.

Limited exemption for US land border crossings

The Self-Quarantine Order was recently amended to exempt a person who enters Canada at a land border crossing in the following circumstances, as long as the person remained in their vehicle while outside Canada:

- The person was denied entry to the United States at the land border crossing, or
- The person entered the territory of the US but did not seek legal entry to the US at the land border crossing.

Canada Emergency Wage Subsidy (CEWS)

Applications received

1,683,020

Total approved applications

1,666,610

Dollar value of subsidies paid

$50.35billion

Source: Government of Canada, 22 November 2020

CEWS update

The Canada Emergency Wage Subsidy (CEWS) continues to evolve to respond to the economic impact of COVID-19. The highlights of the latest CEWS developments are as follows:

- The CEWS has been extended to June 30, 2021.
- The CEWS definition of "eligible employee" has been amended to mean an employee, in respect of a week in a claim period, is an individual employed primarily in Canada throughout a claim period or a portion of the claim period. Generally, "primarily" means more than 50%.
- The maximum subsidy rate for claim periods 8 to 10 (from October 2020 to December 2020) will remain at 65% (40% base rate + 25% top-up rate).
- Beginning in October 2020, the top-up rate and the base rate will now be calculated using the same one-month revenue drop.
- Starting in claim period 9 (November 2020), the calculation for employees on leave with pay now aligns better with employment insurance benefits.
- Eligible employers can now calculate pre-crisis pay (baseline remuneration) for employees who were on certain kinds of leave, retroactive to claim period 5 (July 2020). The pre-crisis period for an employee on a certain kind of leave begins 90 days before the date on which the employee commenced their leave.
- The CRA is finalizing the creation of a database called the "CEWS Employer Search" which will contain a list of corporations that have received the CEWS.
- The deadline to apply is January 31, 2021, or 180 days after the end of the claim period, whichever comes later.
- An eligible entity can file an amended application for the CEWS, provided it is filed before the deadline to apply for the CEWS.
- The estimated cost of the CEWS is $68.5 billion to the end of December 19, 2020.

The details for the claim periods beginning after December 19, 2020 are expected to be released in the coming weeks. Please refer to the Dentons "legal backgrounder on the CEWS" here for full details on the program. The legal backgrounder will also be updated to provide full details on the new claim periods that extend to June 30, 2021 once available.

Key labour & employment legislative developments

Legislators had a busy year enacting new laws to deal with the fall-out of the pandemic. However, in addition to these pandemic related changes, federally regulated employers and provincially regulated employers in Alberta had to get up to speed on significant changes to their employment standards regimes.

The future office will be **“designed to support collaboration and accelerate creativity and team spirit.”**

Source: Fast Company website: This is what the office will look like in 2022, 17 November 2020

Changes to Alberta's employment standards legislation

On July 29, 2020, Bill 32, *Restoring Balance in Alberta's Workplaces Act*, 2020 (Bill 32), received royal assent. Bill 32 introduced some significant changes to Alberta's *Employment Standards Code* (ESC), some of which have been outlined below.

The following amendments to the ESC came into effect on August 15, 2020:

Temporary layoff

- The requirement for written notice to be provided to employees in advance of a temporary layoff (unless the employees are subject to a collective agreement), has been removed.
- The period of time before employees are deemed to have been terminated when on a layoff has increased from 60 days to 90 days within a 120-day period.
- An exception for COVID-19 related layoffs has been maintained. A temporary layoff for COVID-19 related reasons may last for up to 180 consecutive days.
- The amount of termination pay payable when an employee is deemed terminated has been clarified.

Group terminations

- Written notice of group terminations is to be provided to the Minister at least four weeks in advance when 50 or more employees, at a single location, within a four week period, are terminated, or if this is not possible, then as soon as is reasonable.
- Written notice of a termination provided to the Minister must include the number of employees being terminated and the effective dates of the termination.
- The group termination provision does not apply to seasonal employees or employees employed for a definite term or task.

Variances/exemptions

- An employer, employer association, or a group of employers are able to apply to the Director for a variance or exemption.
- The requirement for the Director to be satisfied that the criteria under the Regulations is met, has been repealed.
- The employer must give a copy of the variance or exemption (and of an amendment or revocation) to each employee to whom it applies.
- The Minister may order a variance or exemption on application by an employer, a group of employers or an employer association.
- There is no time limit for the Order.
- There is no prohibition on renewals.

The following amendments to the ESC came into effect on November 1, 2020:

Payment of earnings and deductions

- An employee's earnings must now be paid following the termination of the employee's employment either: (i) within 10 consecutive days after the end of the pay period that the termination of employment occurred, or (ii) within 31 consecutive days after the last day of employment, whichever the employer chooses.

- Employers may, upon providing notice to the employee, deduct overpayment of earnings paid from payroll calculation errors (for up to six months following the error) and vacation pay paid in advance of an employee being entitled to it.

Rest periods

- The requirement for 30-minute rest periods after every five consecutive hours has been removed and replaced with the requirement for an employer to give one 30-minute rest period for a shift between five hours and 10 hours in length and a second 30-minute rest period where the shift exceeds 10 hours.
- Employers and employees may continue to agree to divide breaks into two 15-minute periods.

Collective agreements

- Collective agreements may take priority over requirements established in the ESC pertaining to hours of work, notice of work times, rest periods, number of days of rest required per consecutive weeks worked, and temporary layoffs.
- Averaging arrangements can be agreed upon as part of a collective agreement between an employer and a bargaining agent, subject to regulations.

Averaging arrangements

- The concept of "averaging agreements," has been significantly amended, and is now referred to as "averaging arrangements."
- Employers can require (without employee agreement) or permit employees or groups of employees to work an averaging arrangement, unless bound by a collective agreement.
- Employers must provide at least two weeks' notice to employees prior to the averaging arrangement commencing.
- The number of weeks an employer can average employees' hours in an averaging arrangement, to determine overtime pay or time off with pay, has increased from 1-12 weeks to 1-52 weeks.
- There is no limit to the term of the averaging arrangement.

Average daily wage

- The formula to calculate an employee's average daily wage for the purposes of calculating general holiday pay has been amended. The employer can choose to calculate the average daily wage rate based on the four-week period immediately preceding the general holiday, or the four-week period ending on the last day of the pay period immediately preceding the general holiday.

Basic vacation entitlement

- Where an employee is on a job-protected leave under the ESC, the period of time they are on leave is included when calculating the employee's years of employment, for the purpose of determining the employee's vacation entitlement under the ESC.

Complaints

- The time limit for filing a complaint, regarding the failure by an employer to pay wages or overtime, by employees who are subject to an averaging arrangement is six months after the averaging arrangement ceases to apply to the employee, or, if it does not cease, six months after the end of the averaging period to which the complaint relates.
- Where an averaging arrangement applies, the assessment period for an order is the period from the beginning of the earliest averaging period to which the claim relates and ending on a date before the date of the order, as determined by the officer.

Legislative update for federally regulated employers

In 2020, in addition to introducing COVID-19 specific amendments to the *Canada Labour Code* (the *Code*), the Government of Canada took further steps to harmonize federal legislation as part of this mandate. Specifically, the Government introduced new regulations on employment equity and workplace harassment and violence that prescribe important new requirements for federally regulated employers.

COVID-19 related amendments to the *Canada Labour Code*

There have been multiple changes to the Code's leave provisions in response to COVID-19. In March 2020, the Government of Canada amended the Code to introduce a job-protected leave of absence for employees unable to work for reasons related to COVID-19. Following the introduction of the *Canada Recovery Benefits Act*, which introduced three replacement benefits for the Canada Emergency Response Benefit (CERB), the Government expanded the *Code*'s leave provisions on September 30, 2020 to better-enable federally regulated employees to access these benefits. The introduction of the 16-week quarantine leave under the *Code*'s existing medical leave provisions – which was originally supposed to come into effect October 1, 2020 – is postponed to September 26, 2021, the day after the CERB-replacement benefits are scheduled to end. Please refer to the Dentons' Employment and Labour Law blog post for more information on the CERB-replacement benefits and the corresponding amendments to the *Code*.

Employment equity changes coming in 2021

On November 25, 2020, the Government of Canada published SOR/2020-236, *Regulations Amending the Employment Equity Regulations*. The *Employment Equity Regulations*, along with the *Employment Equity Act*, prescribe measures aimed to address wage gaps experienced by women, Indigenous peoples, persons with disabilities and members of visible minorities (the designated groups).

Federally regulated employers, including private sector employers, have obligations under the *Employment Equity Act* to implement employment equity by:

- Developing and eliminating barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
- Instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representative in each occupational group in the employer's workforce that reflects their representation in the Canadian workforce or those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

As part of these obligations, employers must:

- Survey their workforce and collect information and conduct an analysis of their workforce;
- Identify any under-representation of the designated groups in each occupational group in the workplace;
- Conduct a review of their systems, policies and practices;
- Prepare and implement an employment equity plan that removes barriers and achieves equitable representation; and
- Establish and maintain employment equity records.

Failure to comply with the requirements imposed by the *Employment Equity Act* could result in monetary penalties.

The *Employment Equity Regulations* prescribe the manner and form by which employers are to comply with their obligations under the *Employment Equity Act*. The Government of Canada last amended the Regulations in 2006. The stated objective of the 2020 amendments is to "streamline the text, increase clarity, improve data gathering and reduce reporting burdens while introducing amendments to collect salary information in a way that supports the implementation of pay transparency measures."[1]

Some of the key amendments to the *Employment Equity Regulations* include:

- Revising the definition of "salary"[2] in respect of private-sector employers to better enable the determination of an hourly rate of pay for the purposes of calculating wage gaps in the workforce;
- Removing the definition of "designated CMA" to ensure reporting covers all census metropolitan areas in Canada;
- Removing references to outdated employment equity information management systems and replacing these references with neutral language, as well as minor amendments to remove requirements no longer relevant to the administration of the Regulations;
- Mandating use of the definitions of designated groups, as defined in the *Employment Equity Act*, in the employer's workforce survey questionnaire;
- Amending the salary sections defined in Schedule VIII for reporting purposes to better align these sections with current salary levels in Canada; and
- Introducing additional record-keeping requirements for employers. Specifically, employers will be required to maintain the following additional records and will need to include such information in their employment equity report:
    - Employee salaries, not including any bonus pay or overtime pay;
    - The period over which the salary was paid;
    - The number of hours of work that can be attributed to the salary earned;
    - The bonus pay paid during the reporting period;
    - The overtime pay in the reporting period; and
    - The number of overtime hours worked to which the overtime pay can be attributed.

1 http://www.gazette.gc.ca/rp-pr/p2/2020/2020-11-25/html/sor-dors236-eng.html

2 Effective January 1, 2021, "salary" will be defined, in respect of a private-sector employer, as "remuneration paid for work performed by an employee, before deductions, in the form of basic pay, pay for piecework, shift premium pay, bonus pay and overtime pay, but does not include benefits, securities, severance pay or termination pay, vacation pay, payment in kind, supplementary payments, allowances, retroactive payments, reimbursement for employment expenses or compensation for extra-duty services other than overtime pay."

Under the *Employment Equity Act*, private-sector employers must, on or before June 1 of each year, file with the Minister an employment equity report for the immediately preceding calendar year containing information in accordance with the prescribed instructions. The amendments introduce detailed instructions on how employers are to complete their annual employment equity reports through Forms 1 to 6. Notably, when completing Form 2 employers will need to provide the mean and median difference in hourly rates, bonus pay and overtime pay and corresponding overtime hours, and the proportion of employees who have received bonus pay and overtime pay.

Along with ensuring that employment equity reports due on or before June 1, 2021 are completed in accordance with the new instructions, employers will want to carefully review their employment equity policies and practices to bring them into compliance with the revised *Employment Equity Regulations* as of January 1, 2021. Such reviews should be timely, and private-sector employers in particular will want to be mindful of the new requirements introduced to the Regulations.

New workplace harassment and violence in the workplace regime coming in 2021

On June 24, 2020, the Government of Canada announced that the *Workplace Harassment and Violence Prevention Regulations*, along with its legislation, will take effect on January 1, 2021. The *Workplace Harassment and Violence Prevention Regulations* introduce a consolidated approach to workplace harassment and violence for all federally regulated employers regardless of sector.

The *Workplace Harassment and Violence Prevention Regulations* impose a number of obligations on federally regulated employers and their "applicable partner", defined as the policy committee or, if there is no policy committee, the workplace committee or health and safety representative for the workplace. Employers and their applicable partners will need to carry out workplace assessments to identify risk factors, and must jointly develop and implement preventative measures that address the identified risk factors within six months. A workplace harassment and violence prevention policy that meets the essential elements prescribed will also need to be developed, as well as a training program that addresses workplace harassment and violence. The *Workplace Harassment and Violence Prevention Regulations* also detail the steps in the resolution process of incidents (referred to as "occurrences") of workplace harassment and violence. These are just some of the many responsibilities federally regulated employers and their applicable partners will need to comply with by January 1, 2021; please refer to the Dentons' Employment and Labour Law blog post for more details on the new obligations.

Canada Labour Code's enforcement and compliance regime coming into force in 2021

On December 4, 2020, the Government of Canada introduced an Order in Council[3] confirming that certain amendments to the Code from *Budget Implementation Act 2017* will be coming into force effective January 1, 2021. These amendments introduce a compliance and enforcement regime to address contraventions of the *Code*.

The amendments authorize labour inspectors to issue compliance orders against employers, and introduce a corresponding process for ministerial and board review of such compliance orders. More significantly, the amendments establish an administrative monetary penalty system to supplement the *Code*'s existing penal system for violations of Parts II and III. As part of this system:

- Employers that contravene or fail to comply with regulations introduced under the system will be liable to a penalty;
- If a corporation or department commits such violation, officers, directors, agents, mandataries of the corporation, senior officials in the department, or any other person exercising managerial or supervisory functions in the corporation or

3 https://orders-in-council.canada.ca/attachment.php?attach=39987&lang=en

department may also be liable to a penalty if they directed, authorized, assented to, acquiesced or participated in the commission of the violation;

- Persons or departments named in a notice of violation do not have a defence that the person or department exercised due diligence to prevent the violation or reasonably and honestly believed in the existence of facts that, if true, would exonerate them;
- Violations that are committed on more than one day constitute separate violations for each day on which they are committed or continued;
- The Minister of Labour may make public the name of an employer who commits a violation of the *Code,* the nature of the violation, the amount of the penalty imposed and any other information prescribed by regulation.

It is expected the Government of Canada will publish the text of the *Administrative Monetary Penalties (Canada Labour Code) Regulations* in the coming weeks. These regulations will prescribe the penalty amounts associates with this new scheme, not to exceed $250,000. The regulations will likely come into force on January 1, 2021 alongside the *Code* amendments.

Amendments providing for the introduction of pilot projects for testing possible amendments to the *Code* through regulations also come into effect on January 1, 2021.

Other things to watch out for in 2021

Additional amendments introduced to the *Code* through the *Budget Implementation Act*, 2018, No. 2, for which no implementation date has yet to be announced, may come into force in 2021. These include the following:

- **Equal treatment for wages**: Employers will be expressly prohibited from paying an employee a lower rate of wages than that paid to another employee on the basis of different employment status. Employers will need to inform all employees of employment and promotion opportunities regardless of employment status. Employers cannot retaliate against employees who request a review of their wages (and must complete such a request within 90 days of receiving the written request), and cannot reduce an employee's rate of wages to comply with the *Code*. Employees will have the ability to make a wage recovery complaint and will have the right to receive reimbursement for reasonable work-related expenses.
- **Revised termination obligations**: Employers engaging in group terminations will need to provide 16 weeks of notice or pay in lieu (or a combination). For terminations of fewer than 50 employees (including individual terminations), employers will need to provide between 2 weeks and 8 weeks of notice or pay in lieu (or a combination) depending on how many years of continuous employment the employee has completed.
- **Prohibition on misclassification of employees**: Employers will be prohibited from misclassifying employees as if they were not employees in order to avoid their obligations under the *Code*. If an employer alleges an individual is not their employee, the burden of proof rests with the employer.
- **Requirement to provide certain information**: Employers will have an obligation to provide employees with information about their labour standards rights and provide employees with a statement containing information about the terms and conditions of the employee's employment.
- **Increased minimum age for work**: The minimum age for work, unless exempted by the *Canada Labour standards Regulations*, will be increased from 17 to 18 years of age.

The pension regulator response to COVID-19

How have pension regulators attempted to help administrators of pension plans in the time of COVID-19?

Pension benefit regulators across Canada have taken a variety of actions to provide relief to pension plan administrators.

Deadlines have been extended for the filing of annual information returns, financial statements, actuarial valuation reports and other required regulatory filings. Timelines have been relaxed for the delivery of certain types of disclosure statements to plan members by administrators.

In Ontario, the regulator paused its activities in levying administrative monetary penalties on administrators who are delinquent in making their regulatory filings. Beware: such a reprieve is certainly temporary. Plan administrators must continue to monitor the status of their regulatory filings and respond promptly to inquiries and warning letters issued by regulators.

Employers with Ontario defined benefit pension plans can delay contributions

In September 2020, the Ontario government amended its pension regulations to provide temporary funding relief to private sector administrators of defined benefit pension plans.

Eligible employers can defer their contributions that are due from October 1, 2020 to March 31, 2021. All deferred contributions are to be made with interest within specified timeframes. Employers who elect to defer their contributions under this option must comply with stringent conditions. Those conditions include the requirement to notify plan members, submit an election form to the Ontario regulator, file updates including prescribed information throughout the deferral period, and refrain from paying bonuses to certain categories of executive employees during the deferral period.

Portability freezes

In addition to offering welcome relief measures to plan administrators, regulators have imposed new safeguards to protect plan members. One of them relates to pension plan payouts made to terminating employees.

For example, in March 2020 the federal pension benefits regulator imposed a complete freeze on portability transfers and annuity purchases from defined benefit registered pension plans. It lifted that freeze at the end of August.

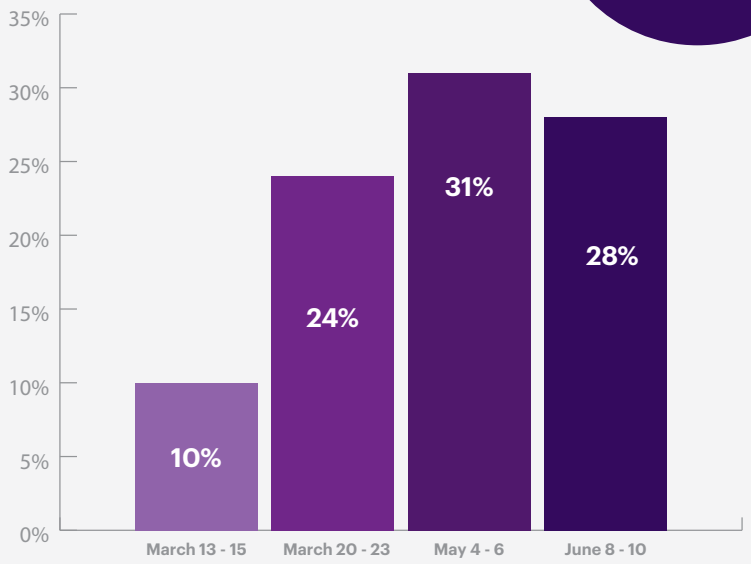
In Saskatchewan, new restrictions on transfers were imposed in April 2020. In October, the Saskatchewan pension regulator issued a notice informing plan administrators of its intent to allow commuted value transfers or payments out of pension plans in certain circumstances.

The efforts of pension regulators and legislators have been extensive, and welcome. Each jurisdiction has its own requirements as to what administrators must do in order to take advantage of COVID-19 relief measures, and the application of new safeguards such as restrictions on payments out of pension plans. Check the requirements of the jurisdiction where your pension plan is registered.

Key case law developments for Canadian employers

Judges sent employers scrambling with a series of decisions that will require action on employment contracts, incentive compensation plans and termination clauses. There was also an indication that employers may be able to gain some flexibility when drafting restrictive covenants.

Percentage of Canadians who have lost work or been laid off due to COVID-19 from March to June 2020



Source: Statista, as at June 2020

Wrongful dismissal litigation — time to tighten up termination language

The law on wrongful dismissals continued to take center stage in 2020 as employers grappled with a number of significant decisions that had important ramifications for businesses across the country.

Termination clauses continue to fall in Ontario

In the fight over the enforceability of contractual termination provisions, Ontario remained ground zero. Two cases were particularly noteworthy.

First, in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, the Court of Appeal for Ontario ruled that an unenforceable "for cause" termination provision rendered a separate "without cause" termination provision null and void. Despite the fact that both provisions existed as stand-alone clauses, the court declined to apply the contractual severability clause which would have acted to "save" the otherwise enforceable without cause termination provision. As a result, the court "linked" the two separate termination provisions by declaring that if one is found unenforceable, both provisions are unenforceable. This case is now under appeal to the Supreme Court of Canada.

Second, in *Rutledge v. Canaan Construction Inc.*, 2020 ONSC 4246, the Ontario Superior Court of Justice struck down another contractual termination provision because it had the *potential* to violate Ontario's *Employment Standards Act*, 2000. In this case, the employee worked as a construction apprentice. Under Ontario's employment standards laws, construction employees are not entitled to statutory termination pay. However, the court ruled that because there was a "chance" that the employee's position could change to something other than a construction employee, the employment contract could potentially deprive the employee of his statutory entitlements. Similarly, the contract also did not provide for statutory severance pay. In Ontario, statutory severance pay is only owing where the employer has (i) a payroll in excess of $2.5 million or (ii) the employer terminated the employment of 50 or more employees in a 6-month period because all or part of the business permanently closed. In the court's view, if the employer grew in size, employing more than 50 employees and then discontinued its business, or else had a payroll more than $2.5 million, the employee would be entitled to statutory severance pay, regardless of his job description. Accordingly, relying on policy considerations set out in past case law, the court ruled that a potential violation of the employment standards legislation, no matter how remote, will invalidate a termination provision.

The Bar on Notifying Employees About Limiting Language in Incentive Compensation Plans Gets Higher

The courts continued to apply their exacting requirements surrounding termination clauses to the limiting language that is frequently found in incentive compensation plans. Employers will often insert language to stock option plans and bonus programs which is intended to limit an employee's entitlement over the notice period. However, the most recent guidance from the courts is that employers must do more than simply insert the necessary limiting language into the relevant plan documents.

In one Ontario case, the court awarded an employee damages for the stock options that would have vested during the 24-month notice period, despite the fact that the stock award agreement unambiguously excluded the employee's right to vest his stock awards after he was terminated. In the court's view, the limiting language (which was apparently otherwise enforceable) was "harsh and oppressive". Moreover, the employer had failed to take reasonable measures to bring the provisions to the employee's attention. On this point the court noted that an email to the employee advising that the terms of a stock award agreement would apply and directing an employee to read that agreement was not a sufficient notification effort.

The Supreme Court of Canada has also weighed in on this issue. In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, the court awarded the plaintiff employee more than $1 million in compensation for the loss of a bonus he would have received under employer's long-term incentive plan (LTIP), but which did not become payable until 13 months after the plaintiff resigned and claimed constructive dismissal.

Because the LTIP was a unilateral contract (i.e. the terms were not subject to negotiation), the language had to be precise and unambiguous in order to remove the employee's common law right to receive damages as compensation for the lost bonus. In this case, the court ruled that the employer's requirement that the employee be "full-time" or "active" at the time of a realization event was not sufficient to remove the employee's common law right to damages.

Takeaways for Employers:

This group of cases will send many employers back to the drawing board as they work to tighten up their employment contracts and incentive compensation plans. In so doing, employers should consider the following:

1. The door is still open for well drafted employment agreements and bonus plans to disentitle employees to bonuses during the notice period. Employers should carefully review contractual termination provisions to ensure that both the just cause and without cause termination provisions comply with relevant employment standards legislation.
2. To restrict an employee's notice entitlement, the employment agreement or bonus plan should include unambiguous language that clearly limits the employee's entitlements following termination. This means that employers must clearly define what it means to be "actively employed".
3. Employers should draw employees' attention to any limiting language in incentive compensation plans by bolding and underlining the relevant clauses.
4. Any renewal documents should expressly highlight the termination language so the employee's attention is drawn to these clauses and should state in plain language that any unvested compensation benefits will terminate in conjunction with the employee's termination.

Employment contracts — court clarifies when employment contracts are enforceable

In *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25, the employee was hired on a one-year fixed-term agreement and was supposed to start working on October 1, 2015. The first agreement contained a termination provision stating clearly that should the Employer terminate the Employee's employment, he would effectively be entitled to the "full balance" of term remaining on the contract. Later, the employer gave him a second contract that would make his employment "month to month". The second contract provided that the employer could terminate on payment of one month of salary in lieu of notice.

Mr. Quach signed the first contract on August 25, 2015 and, despite his reluctance to do so, he signed the second contract on September 28, 2015 after being told he had to sign it in order to start working. He never worked a day for the employer. He was fired on September 30, 2015.

The British Columbia Court of Appeal upheld the trial judge's decision that the second contract was not enforceable as it failed to provide fresh consideration. The award to the Plaintiff of payment of a full year's salary ($138,000 although the award for aggravated damages was set aside on the basis that there was no evidence the employee had suffered the type of mental distress needed to ground that part of the award).

Quach is a case that reminds us of a few basic employment law principles:

- Fresh consideration is necessary in order to create or vary a contract (see *Singh v. Empire Life Ins. Co.*, 2002 BCCA 452).
- Where a fixed term contract is terminated prior to the end of the fixed term, the employer faces liability for the balance of the term remaining (which, on the facts of this case, was the whole term).
- Whether amounts earned in mitigation by an employee will be deducted will depend on the contract language:
    a. Where the contract language provides for an expressed payment on early termination, that amount is a liquidated amount and deductions relating to amounts earned in mitigation post-termination will not be made.
    b. Absent an enforceable termination provision or where the contract is silent on early termination, the balance of the term will be payable but amounts earned in mitigation during the term may be deducted from the amount owing to the employee depending on the jurisdiction of employment and the specific language of each contract.

Restrictive covenants — the return of blue pencil severance?

Court of Appeal uses blue pencil severance to save non-competition covenant

At the start of the employment relationship, many companies require employees to enter into employment agreements, which contain restrictive covenants, such as non-solicitation and non-competition provisions. These provisions are intended to protect the employer for a period of time following the end of the employment relationship and require that former employees not solicit customers or employees and, in some circumstances, not compete against the employer.

These types of provisions are often difficult to enforce as judges view them as a "restraint of trade". To increase the likelihood of a restrictive covenant being enforceable, it must be as narrow as possible in terms of geographic and temporal scope and be unambiguous and certain at the time the employment agreement is signed.

Further, the Supreme Court of Canada has previously held that, in the employment context, courts will not impute missing terms into a restrictive covenant to provide more certainty. More specifically, a court should not sever unreasonable portions of a restrictive covenant to make the provision enforceable, absent exceptional circumstances.[1] Therefore, generally speaking, in the employment context, if a restrictive covenant contains an unreasonable or ambiguous term, the entire clause will be viewed as invalid and unenforceable.

The restrictive covenant case to know for 2020

However, a recent case from Alberta has highlighted that courts will consider the context surrounding the parties entering into a restrictive covenant when determining whether to sever or rewrite the provision to make it enforceable. In the case of City Wide Towing and Recovery Services Ltd. v Poole, the Court of Appeal of Alberta used the legal doctrine of severing or blue-penciling in order to find that a non-competition provision, entered into as part of an asset purchase deal, was enforceable.[2]

In this case, the employee was a former owner of Capital Towing. In 2017, he sold the assets of Capital Towing to City Wide Towing (City Wide). In connection with the asset sale, the employee entered into a non-competition agreement that prohibited him from competing with City Wide for a period of five years from the date of the sale, in British Columbia, Alberta, Saskatchewan and any other location within Canada that City Wide and its affiliates carried on business.

In 2018, the employee resigned from City Wide and commenced employment with DRM Recovery Ltd. (DRM), an alleged competitor of City Wide. City Wide commenced an action against the employee for, amongst other things, the breach of the non-

1 *Shafron v. KRG Insurance Brokers*, 2009 SCC 6.
2 *City Wide Towing and Recovery Services Ltd. v Poole*, 2020 ABCA 305.

competition agreement. Additionally, in January 2020, City Wide brought an interlocutory application against the employee and DRM for an interim injunction to prevent the employee from soliciting business, employees and/or customers, and engaging in a competing business in any way, in Alberta, British Columbia and Saskatchewan.

The chambers judge concluded that the test for an injunction had been met, as the restrictive covenants were clear and the employee was clearly in breach of these covenants. The chambers judge then analyzed the geographical scope of the non-competition agreement by considering that the purchaser, City Wide, carried on business in BC, Alberta, and Saskatchewan. The chambers judge granted the injunction on this basis, preventing the employee from soliciting or competing in all three provinces.

The employee and his new employer, DRM, appealed the interim injunction to the Court of Appeal, on the basis that the geographic scope of the non-competition clause was unreasonably broad and unenforceable.

The Court of Appeal found no reviewable error concluding that the restrictive covenants were clear and that the employee was in breach of the covenants. However, the Court of Appeal provided that the enforceability of the restrictive covenants in question must also be considered when determining whether to grant an injunction. If a restrictive covenant is unreasonably broad, it will not be enforced.

The Court of Appeal considered whether the non-competition covenant was overbroad and found that, because the covenant was made pursuant to an agreement for the sale of a business, the appropriate geographical scope is based on the activities of the business that was sold in the transaction, Capital Towing, rather than the business of the purchaser, City Wide. As Capital Towing did not carry on business outside of Alberta, the geographical scope of the non-competition provision, which included Alberta, BC and Saskatchewan, was too broad.

Therefore, the Court of Appeal held that the injunction preventing the employee from competing in Alberta, BC and Saskatchewan could not be upheld.

However, the Court then considered whether using the legal doctrine of blue pencil severance to narrow the geographical scope of the clause would be appropriate in the circumstances to save the non-compete obligations. Blue pencil severance is the concept that the court will, in essence, redraft, the unenforceable provision by removing the elements of the provision, which make it unenforceable. To make the non-competition covenant enforceable in this circumstance would require the Court of Appeal to remove reference to BC and Saskatchewan from the provision, and leave only Alberta.

The Court of Appeal provided that severing terms of a contract, like non-competition provisions, has broader application in the commercial context compared to the employment context. This is because, in the context of a commercial transaction, the employee has equal bargaining power to the employer. In the employment context, an overbroad restrictive covenant will be entirely unenforceable because of the power imbalance between employer and employee. However, as this case dealt with a non-competition covenant signed in the context of an asset sale, severance could be applied. The Court of Appeal did so, and severed BC and Saskatchewan from the language of the non-competition covenant.

The Court of Appeal went on to find no reviewable error in the chamber judge's conclusions that there would be irreparable harm and that the balance of convenience could not favour the breaching party. The Court of Appeal upheld the injunction, as it related to non-solicitation provisions and the non-competition covenant, as severed.

What this means for employers

This case provides support for the proposition that a court will consider the specific facts surrounding the context of restrictive covenants such as non-competition covenants. In determining whether such covenants are enforceable, courts will consider whether the covenant was entered into as part of a commercial transaction, or as part of an employment agreement. Where it was entered into as part of a commercial transaction, courts may sever or blue pencil the provision to make the covenant enforceable. However, we would recommend that, notwithstanding this decision and regardless of the context surrounding the use of a non-competition or non-solicitation covenant, an attempt always be made by employers or companies to create a reasonable covenant that is appropriate in the circumstances. In our view, there remains risk with drafting an overly broad clause and we would caution against relying on the courts to fix any enforceability concerns that may arise.

Things we are keeping an eye on for 2021

As we turn our attention to 2021 and hopefully the end of the pandemic, there are a number of issues we are keeping an eye on. What does the next stage of remote working look like? Can employees require that employees get the COVID-19 vaccine? Will there be a COVID-19 bump in wrongful dismissal cases? These are just some of the matters that we think will be of interest to employers in the coming year.

An August KPMG survey found that 69% of CEOs are planning to downsize their office space

Source: Fast Company website: This is what the office will look like in 2022, 17 November 2020

Working remotely - the next phase

Remote work in other jurisdictions

As 2020 slides into 2021, employees who are able to work remotely will likely continue to do so from their home offices. If home offices are in a different province than the workplace where employees usually work, this can present a jurisdictional risk to the employer. If home offices are in a different country than the workplace where employees usually work, then this can also present corporate, tax and immigration risks for the employer and the employee.

The starting point for understanding this, is the fact that employees are subject to the employment laws of the jurisdiction in which they provide the majority of their services. Let's use an Ontario company as our example for all of the scenarios that follow. For example, if an employee works in Ontario for a provincially regulated employer, they will be subject to Ontario employment laws. However, if the employee continues to work for the same company but moves to another province permanently, they will now be bound by the employment laws of that other province. This issue arises most frequently for workplaces along the border of Ontario and Quebec, as oftentimes employees who work in one province, live in another. With employees moving to remote work during COVID-19, one can see an issue arise where the employee of the Ontario company is now working full-time from their home or cottage in Quebec. As COVID-19 drags on, this presents two potential problems. First, the employee may assume that they are permitted to work remotely from their home permanently, even after a resolution to COVID-19 is reached, and it may be difficult to get them to return to the corporate workplace. Second, the employee may assume that they are now employed in Quebec, and therefore subject to Quebec employment laws. This can have a number of unintended consequences, including the fact that the terms of the employee's prior Ontario employment agreement may no longer be valid.

When an employee moves to another country to work during COVID-19, the potential issues increase. In this scenario, our Ontario employee has now moved to the United States for the duration of COVID-19, to be closer to their parents. In addition to jurisdictional issues, there may be a risk of the Ontario company being seen to have established a corporate presence in the U.S., which in turn may trigger a corporate tax liability in the U.S. In addition, if the employee enters the U.S. under the pretense of visiting family when in fact they are also going to be working, this can create potential immigration issues which may result in the employee having to leave the U.S. and return to Canada. None of these potential issues should necessarily prohibit an employee from moving to another country to work during COVID-19, but both the employer and the employee should be aware of the issues so that they can be investigated and managed in advance.

In addition to possibly obtaining immigration and tax advice before employees are permitted to work in another country, employers should always provide employees with written notice confirming their primary workplace and jurisdiction of employment if they will be changing jurisdiction for a period of time during COVID-19. In addition, the notification should make it clear that the permission to work remotely in another jurisdiction is a benefit being extended due to COVID-19 and that the employee is expected to return to the company's office in the primary workplace once

COVID-19 issues resolve, or at the company's discretion. Getting out ahead of these issues in this way will help to keep jurisdictional issues at a minimum.

Occupational health and safety

Under occupational health and safety legislation, employers are required to ensure the health and safety of their workers (which term usually includes both employees and contractors) in the workplace (which term generally means any place in which a worker works). As a result, employers have an obligation to ensure the health and safety of their workers in their home remote workplaces.

The way to do this is not much different than is the case in an office workplace. First, the employer's Joint Health & Safety Committee or representative(s) need to consider all of the various types of potential health and safety issues that might arise in a home office. Second, they need to reach out to employees in order to inquire as to whether there are any issues or potential issues that they can assist with. Oftentimes the easiest way to do this will be with a questionnaire. Among the things to be considered are the following: ergonomic issues; whether or not there are potential hazards in the workspace; potential domestic violence issues.

If employees have ergonomic issues in their home workspace, the employer has an obligation to investigate and try to resolve the issues. If employees are going to be working remotely for a lengthy period of time and not coming into the primary business workplace, it may be possible to move ergonomic equipment from office to home for the duration of the remote work period, so as to minimize office equipment costs.

Overtime

Employers should be attuned to potential overtime issues when it comes to employees who are working remotely. For those employees who are non-exempt (i.e. who are entitled to overtime pay for overtime hours worked), safeguards should be put into place in order to guard against unanticipated overtime claims.

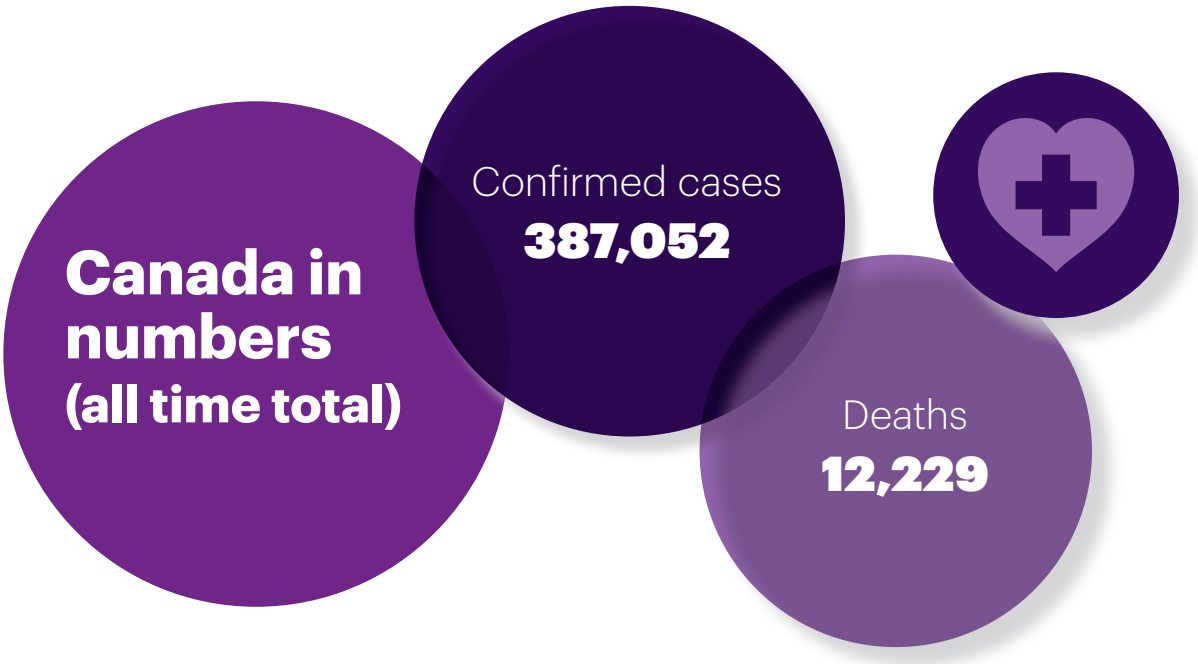
As a starting point, it's important for employers to know that they will not generally be protected by an overtime policy which prevents overtime from being worked unless it's approved in advance. If employees can demonstrate that they worked the overtime, they will be entitled to overtime pay irrespective of what a policy says. As a result, a policy is just a starting point, and employers should consider implementing an hours of work and overtime plan, as well as training for supervisors.

In particular, if employees are required to submit their hours on a regular basis and if those hours are reviewed by the company, any unapproved overtime claims will soon come to light and can be managed by the employer through discussion and possible discipline. As well, supervisors should be attuned to the fact that employees will often continue to work outside of regular working hours if they are trying to get a job done or to impress. As a result, supervisors should try to refrain from emailing employees after working hours, and should be prepared to intervene if they see their reports working more than they should. In addition to being good business, ensuring that employees don't overwork themselves is good for employee work-life balance and mental health.

Corporate protections

When employees work remotely, it is sometimes more common for them to not pay as much attention to the security of corporate information and documents as they otherwise would in the regular workplace. Having proper confidentiality agreements and policies in place is a good starting point for employers, but extra considerations may be needed. Training sessions may help to remind employees about their obligations. Those obligations may include the following: keeping family members off company computers and phones; refraining from downloading or streaming entertainment onto company property; and keeping company documents locked up when not being used.

In addition, thought may need to be given to what sort of remote workplace employees are using. While remote working in coffee shops is not as common as it was before COVID-19, the reality is that any place with Wifi is a potential workspace. Employees may need to be reminded that if they sign into Wifi in public spaces, they may leave themselves open to snooping, hacking, and even attacks. Even for companies that permit working in public remote workspaces, thought should be given as to the extent of what is permitted by employees and how to be protect company confidential information.



Source: Johns Hopkins University of Medicine, 2 December 2020

Will there be a COVID-19 bump in notice cases?

How much notice is the employee entitled to?

That remains the fundamental question that Canadian employers face when dismissing an employee without cause.

Unless there is valid and enforceable termination provision in the employee's employment agreement or a subsequent agreement that limits the employee's entitlements at termination, the employee will be entitled to common law reasonable notice. The courts have repeatedly said that there is no formula when determining reasonable notice. Rather, it requires an analysis that depends on the employee's age, length of service, character of employment and the availability of similar employment in the marketplace. In carrying out this analysis, the court will look at the context of the employee's situation in determining what is a reasonable period of time for the employee to find comparable employment. As a result, if an employee is dismissed during the COVID-19 pandemic, the prevailing economic conditions could be a factor which the courts consider when determining an employee's notice period.

To date, there have been few decisions on this point. That said, there have been a few judgments issued this year which explicitly reference the pandemic, and can therefore perhaps provide some guidance.

In *George v. Laurentian Bank Securities Inc*, 2020 ONSC 5415, a 58-year-old Vice President Equity Trading who earned approximately $100,000 annually was dismissed after only five months of employment. In its decision, the Ontario Superior Court referenced the fact that at the time of hearing of the motion, Mr. George remained unemployed (some 15 months after his employment was terminated). The Court further noted that the matter was being heard while "Ontario continued to be coping with the economic realities of COVID-19."[1] Notably, Mr. George was not dismissed during the pandemic. The Court did not elaborate on how the pandemic impacted Mr. George's ability to find other employment and ultimately awarded Mr. George only two months' notice of termination. This represents an interesting development in the case law since the notice period for Mr. George falls at the low end of what similarly situated employees might ordinarily receive.

Further, in Rothenberg v Rogers Media Inc., 2020 ONSC 5853, a 73-year-old broadcaster who was employed by Rogers' Media or its predecessor for almost 20 years was dismissed on August 14, 2018. At the time of dismissal, Mr. Rothenberg earned an annual salary of almost $40,000, and had no secondary or post secondary education. Ultimately the Court awarded him 21 months of reasonable notice.

1 *George v Laurentian Bank Securities Inc,* 2020 ONSC 5415 at para. 9.

In this case, the Court specifically referenced the pandemic when discussing the difficulty Mr. Rothenberg had to find comparable work: "In March 2020, the economy in Ontario including Southwestern Ontario took a drastic downturn due to COVID-19 making jobs even more scarce. The number of unemployed persons campaigning for any available jobs also increased."[2]

In coming to the 21-month determination, the judge determined that Mr. Rothenberg had a specialized role in a shrinking industry that was difficult to replicate. The Court also noted that the range for someone in Mr. Rothenberg's position would be between 18 months and 22/23 months. However, despite Mr. Rothenberg's age and the specialized nature of his role, the judge did not award him an amount at the high end of the scale. While there is nothing to explicitly indicate that the judge in this case was balancing the economic impact of COVID-19 on Mr. Rothenberg's employer, it is curious Mr. Rothenberg was not awarded a higher amount.

While there is little case law specifically referencing the COVID-19 pandemic, the courts in Canada have historically considered what, if any, impact an employer's economic situation should have on an employee's right to reasonable notice.

The generally held authority on this is a case from the Ontario Court of Appeal in *Michela v. St. Thomas of Villanova Catholic School* 2015 ONCA 801 (*Michela*). This decision definitively held that an employer's poor economic circumstances **do not** justify a reduction of the notice period to which an employee is otherwise entitled.[3]

However, other jurisdictions have indicated the employer's financial situation remains a relevant factor. For example, in a 2017 decision from Alberta, *Freeman v PetroFrontier Corporation*, 2017 ABQB 340, the Court suggested that a depressed economy **could** provide justification for either increasing or decreasing the notice period, depending on the circumstances. The Court noted that it might be "unrealistic (and unfair) to burden an employer with the same notice period in a depressed economy."[4] Though this case did not reference the decision in *Michela*, the decision was rendered two years after it.

The question remains whether or not the current economic depression felt by employers will be a relevant factor in determining a dismissed employee's notice period. Given the Court of Appeal's decision in *Michela*, and until a different authority prevails, employers would be wise to not take their economic situation into consideration when determining a dismissed employee's notice period. However, many lawyers anticipate that given the novelty of the current global pandemic and its far-reaching effects, courts will be bound to provide decisions that balance the impact on both the employer and employee.

In the meantime, if a dismissed employee takes the position they are entitled to a longer notice period in bald reference the economic impact of COVID-19, employers should ensure the dismissed employee is able to substantiate their position. There are, in fact, many industries that continue to be profitable, and many organizations are readily hiring. It is not simply enough for a dismissed employee to say it is harder to find employment, they have to show that it is. As employers, you may consider taking stock of the availability of comparable roles and the actual effects of COVID-19 on the marketplace when determining an employee's severance package.

2 *Rothenberg v Rogers Media Inc.*, 2020 ONSC 5853 at para. 15.
3 *Michela v. St. Thomas of Villanova Catholic School* 2015 ONCA 801 at para. 22.
4 *Ibid*, at para 33.

Beware the COVID-19 class action...

This year has seen a resurgence in the viability of employment law class actions. Up until the recent decision in the *Fresco v. Canadian Imperial Bank of Commerce* (see the summary judgment decision on liability at 2020 ONSC 75 and the decision on damages issues at, 2020 ONSC 4288), it was largely considered difficult to bring a viable class action in the employment context for a variety of reasons. If the class had workplace injury claims, the proper forum was largely considered the applicable workers compensation authority in any given province. Unionized workers need to pursue claims through the grievance procedures set out in collective agreements rather than through the courts. Non-unionized workers often had too many "individual issues" to make the class action procedure the preferable procedure for resolution of civil breach of contract claims.

In *Fresco*, the court held that CIBC's overtime policy was generally illegal and unenforceable and has certified a number of common issues to assess damages of workers impacted by the illegal policy over a 16-year period for a class of over 30,000 employees. As a result, the door appears to be open for a potential increase in employment-related class actions relating to the actions that employers have had to taken in response to the economic consequences of the pandemic. There may well be repercussions for the mass layoffs and wage reductions employers were undertaking in March and April of this year over the next two years as law suits of this nature begin to gain some traction. While many employers already started taking "make whole" steps for actions taken earlier in the year, it is unclear how much litigation may actually result from the actions employers have had to take in order to keep their business viable during the pandemic.

Zoom investigations - workplace investigations in a virtual world

While the pandemic has potentially irrevocably changed how we view work and the workplace, the laws relating to the obligations that employers owe their employees have stayed the same. That is true of the obligation to ensure a safe workplace and the general duty to investigate certain workplace complaints relating to safety and other issues, such as bullying and harassment. How investigations are conducted must adapt to address COVID-19 safety concerns. Some best practices for conducting workplace investigations in the age of COVID-19 include:

- Know the legal requirements. Different statutes have different investigation obligations relating to different complaints. Part 2 of the Canada Labour Code for example, imposes a series of requirements on an employer to investigate an unsafe work refusal. Other provincial health and safety legislation simply requires an employer to investigate complaints.
- If you have an external investigator, have the investigator trained on COVID-19 safety protocols applicable to your organization. The investigator must follow your COVID-19 safety policies and procedures just like anyone else accessing in your organization.
- Where possible, encourage your investigator to conduct interviews by phone or videoconference to minimize potential exposures among those involved in the investigation.
- Make sure that any onsite or offsite in-person interview can be undertaken safely and include an obligation for participants to follow all local public health and occupational health and safety rules including rules about symptom screening, distancing and wearing masks.
- Train employees on policies pertaining to workplace safety and other matters where an investigation might be required and include a component on participating in investigations so that employees know what to expect in the event of an investigation. The obligation to train workers annually on appropriate workplace conduct has not been suspended because of the pandemic.
- Keep track of any in-person meetings at the workplace or otherwise and where they take place in case you need to take steps to sanitize areas or otherwise contain the risk at the workplace of COVID transmission.
- Once the investigation is completed, communicate the outcome to stakeholders keeping in mind the same safety protocols applicable to the workplace generally and implement recommendations quickly.

In a Colliers International survey of managers and decision-makers at nearly 80 companies, 86% said that moving forward, employees will work between one and four days at home.

Source: Fast Company website: This is what the office will look like in 2022, 17 November 2020

Can employers force employees to get the COVID-19 vaccine?

As of December 14, 2020, there has not been any legislation passed by any provincial or federal government which would make the COVID-19 vaccine mandatory. That said, depending on the nature of the workplace, an employer may be able to require that its employees obtain the vaccination. For example, employers will have a strong case to introduce a mandatory vaccination policy for employees who are working in a healthcare setting or with the elderly in long-term care homes. Indeed, many of these workplaces already have a mandatory flu shot policy and there is case law where an employee's failure to comply with the flu shot policy constituted cause for dismissal. Specifically, in Barkley v. Mohawk Council[1], a nurse working as a non-unionized employee on a fixed term contract at an adult care facility (involving frail and elderly patients) refused to comply with the facility's mandatory influenza immunization policy on the basis she had never been sick with the flu and had faith in her immune system. The employer described the immunizations as a condition of continued employment, and anyone who refused to get the vaccination would be dismissed. At the hearing, the employer led evidence about the risks the flu posed to residents with whom the employee had frequent contact. Given the employee was a nurse, the Arbitrator ruled that she knew or ought to have known the risks. As such, the Arbitrator ruled that there was a legitimate interest on the part of the employer in the residents' wellbeing and health. The decision to impose vaccination was therefore not unreasonable and the termination of the employee's employment was upheld.

Outside of the healthcare setting, an employer will likely have a more difficult time imposing a mandatory vaccination policy on its employees. While a case could be made which will support employers requiring certain front-line workers to obtain the vaccination where they are working in close quarters (e.g. factories; agricultural processing plants) or are public facing (e.g. transportation) such a policy would be subject to human rights and privacy legislation. An employee may have valid medical or religious grounds for refusing to obtain the vaccine that will trigger the employer's duty to accommodate. It is also worth noting that there could be indirect ways that being vaccinated could become mandatory in a workplace setting outside of healthcare and frontline workers. For example, if an individual is required to travel frequently for his/her job it could be a reasonable expectation the individual maintains the proper vaccinations (including COVID-19) – it may even be required to fly on some airlines or cross borders. In those circumstances, employers would need to show that such a requirement constitutes a bona fide occupational requirement and that the individual cannot be accommodated without undue hardship before it could overcome any accommodation challenges.

1 2000 CarswellNat 3877.

Finally, it is important to note that the Ontario government is now planning to introduce proof of vaccination cards. Naturally, some employers may want employees to show their vaccination card as they begin the transition back to their physical workplaces. However, Ontario's *Occupational Health and Safety Act*, prohibits employers from seeking to gain access to an employee's health records without the employee's written consent.

Needless to say, employers should be closely watching the implementation of the COVID-19 vaccines.

"Canada has reserved more than four times what's needed to inoculate its population"

Source: Tracking the Coronavirus Vaccines That Will End the Pandemic, *Bloomberg.com*, 9 December 2020

A more inclusive workplace

Although COVID-19 dominated the headlines for much of the year, the story of racial inequality caught fire during the summer and has led to thought provoking discussions at home and in the workplace.

The issue of diversity and inclusion is not new; however, the events of 2020 focused the world's attention on this issue like never before. In Canada, employees have robust protections under the various provincial and federal human rights and employment equity legislation. That said, as employers work to root out systemic racism, it is likely that there will be a stringent focus on company hiring practices to ensure that the recruitment and candidate selection process are free of systemic bias. Further, employers will also be working to create a safe space for their employees to exchange ideas on how to improve the current status quo. Certainly, this is a watershed moment for employers across the world and we expect that Canadian employers will be following suit with no shortage of positive initiatives.

Keeping mental health top of mind

Throughout the pandemic, and in many of our toolkit publications, we have identified mental health as a primary concern for employers. Recently, the Canadian Mental Health Association (CMHA) published a report, which revealed that 40% of those surveyed in September said their mental health had deteriorated since the beginning of the pandemic in March. Most shocking was the study's finding that one out of 10 Canadians had contemplated suicide since the pandemic began.

This data, along with the anecdotal experiences of managers across the country, indicate that people are generally feeling overwhelmed, burned out and anxious. The arrival of the vaccine constitutes welcome news for everyone; however, there is likely to be some fatigue that will persist amongst employees well into 2021 and could lead to mental health issues.

Employers remain subject to the duty to accommodate and are required to have policies and procedures to protect and promote equality in the workplace. As a result, while the law in this area has not undergone any significant changes in 2020, we expect that accommodation issues will continue to frequently arise in all workplaces across all industries in market sectors.

ABOUT DENTONS

Dentons is the world's largest law firm, connecting top-tier talent to the world's challenges and opportunities with 20,000 professionals including 12,000 lawyers, in more than 200 locations, in more than 80 countries. Dentons' polycentric and purpose-driven approach, commitment to inclusion and diversity, and award-winning client service challenge the status quo to advance client interests.

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