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The Latest on Termination Clauses

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The Continuing Impact of *Waksdale*

- Recent court cases continue to show importance of "just cause" clauses in employment agreements
- How much terms of employment contract must be read together (even when severability clause exists)
- If employer does not "do it right", no leeway from a court

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- Risk is that if contract term fails, common law notice applies – always more costly

Rahman v. Cannon Design Architecture Inc. (Court of Appeal 2022)

- Appeal to Court of Appeal of September 2021 ruling of Ontario Superior Court of Justice decision
- Issue was application of W*aksdale* decision to "sophisticated" employee who had received legal advice before signing employment agreement

- *Waksdale v. Swegon* (2020) - where just cause clause exists which provides for no notice or ESA payments, violates ESA - "willful misconduct, disobedience or willful neglect of duty" language in ESA does not completely equate to "just cause" at common law
- Disentitles employee in all just cause scenarios, even just in these cases
- *Waksdale* provided that void "cause" clause leads to void not-for-cause clause, because all termination provisions are one – common law then applied

Rahman v. Cannon Design - Facts

- Rahman hired in 2016 in executive position
- Subject to employment agreement and officer agreement
- Officer agreement was with related company
- Cannon suggested Rahman receive legal advice, which she did
- Rahman terminated in 2020 without cause

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- Employment agreement contained "just cause" termination clause as follows:

"Cannon Design maintains the right to terminate your employment at any time without notice or payment in lieu thereof, if you engage in conduct which constitutes just cause for summary dismissal"

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- Rahman sued for common law notice and brought motion for summary judgment
- Also sued for declaration that all three companies in corporate group to whom she provided service were employers
- Rahman relied on just cause clause and *Waksdale*

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- In *Rahman*, motion judge agreed that "technical" breach of ESA, but felt intention clear that ESA amounts only to be provided
- Because Rahman had "experience and sophistication" and legal advice before signing, held that subjective intent to comply with ESA should be enforced

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- Motion judge also rejected all three corporations being common employer, as only one had offered employment and paid her
- Being part of group should not lead to a common employer finding

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Court of Appeal Decision

- Court of Appeal found that motion judge erred in enforcing termination clause
- In determining contravention of ESA, appropriate to look only at words of termination clause and not external circumstances
- Consequently, negotiations before agreement or subsequent conduct of parties (including on termination) cannot save void termination provision
- Thus, that parties negotiated term, and that Rahman had legal advice, made no difference – on plain words, cause clause void and therefore not-for-cause clause also void

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- Because termination clauses void, Rahman entitled to common law notice
- Similar theory to *Machtinger v. Hoj* (1992) – intent to have short termination clause not enough to affect length of common law notice – intent has no impact if technicalities not met

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- On common employer issue, Court of Appeal also overturned motion judge's decision
- Court looked at factors showing that companies interrelated, and that employment relationship intended to be with all, including:
  - Common branding and association on letterhead and company websites
  - Supervisory relationships and meetings which intertwined companies
  - Common bonus pool within group

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Conclusion

- When initial *Rahman* motion decision released, offered some hope that with most sophisticated employees who had negotiated their termination clauses, especially with legal advice, clauses would not be voided by "technical" breach
- Court of Appeal has made it clear that employers either do it right or suffer the consequences
- Identity and nature of employee do not matter

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- "Technical" breach is same argument made when employer excludes benefits during ESA notice period on termination in contract, but nonetheless provides them
- No factual breach of ESA, but contractual exclusion sufficient to void clause and result in common law notice applying
- Must assume that *Waksdale* will likely apply to mean that void for-cause termination clause will void other termination clauses

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Lessons for Employers

1. Check all employment agreement templates for old-style "just cause" clauses and have them revised
2. For existing employees, consider whether to try to amend the employment agreement to "fix" clause – fresh consideration must be provided – reason may need to be given and well-informed employees have no reason to agree, unless relatively short service

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The "Extra" Termination Clause Pitfall

- Employment agreements sometimes contain "termination" language or concepts other than in termination clause
- E.g., probation clause which states what will happen if terminated during probation
- Other such clauses relate to matters such as breach of confidentiality or ethical codes of conduct

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- A bad idea for a number of reasons:
1. Possibility of contradiction with other termination clauses, thereby creating an ambiguity and voiding both
2. Possibility of breaching ESA, and thereby voiding other termination clauses
- This is what occurred in *Henderson v. Slavkin* (Ontario Superior Court, 2022)

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Henderson v. Slavkin - Facts

- In 2015, plaintiff receptionist was asked by employer dental surgeons to sign new employment contract with fresh consideration
- Termination clause limited entitlements upon termination to ESA only
- After 30 years of service, employee terminated in April 2020
- Confidential information and conflict of interest clause provided that breach would be cause for termination without notice or compensation in lieu

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- Court held that termination clause void
- Also, secondary clause related to termination for breach confidentiality and conflict of interest clause broader than "willful misconduct, disobedience or willful neglect of duty" in ESA and therefore breached ESA
- Court also held that provision ambiguous because of possibility that breach may have been inadvertent or trivial
- Voided not-for-cause termination clause because related to subject of termination

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- Court stated: "an employee is entitled to know at the beginning of an employment relationship what their entitlement will be at the end of their employment and how and when it may be terminated without cause. In this case, it is not clear in what circumstances the disclosure of confidential information may occur without immediate termination for cause without notice"
- Common law notice applied

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- Employers often feel strongly that should threaten termination in clauses of particular importance to them in order to convey seriousness with which they view these issues
- But perfect example of "less is more"
- Conveying seriousness does not necessitate threatening any particular consequence in clause - consequences driven by contract and law, like any other serious misconduct

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Lessons for Employers

1. Remove all termination language not in actual termination clause ie. in probation or other clauses
2. Revise termination clause to address probation if necessary
3. Emphasize importance of confidentiality, conflict of interest, code of conduct and other matters without prescribing specific consequences
4. For existing employees, consider offering fresh consideration for an amended clause – again, difficult to do without disclosing reasons and longer term employees have no reason to agree
5. Don't correct in new contact and then immediately terminate employee

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Options for Termination Clauses

1. Have 1 clause providing ESA-only minimums in all circumstances ie. whether willful misconduct etc. or not
2. Have 1 clause providing ESA-only but insert words ("if any") to denote that ESA will govern whether notice or payment given
3. Have 2 clauses and provide ESA-only for willful misconduct etc. and better formula otherwise
4. Have 2 clauses but replace "cause" or "just cause" with "willful misconduct" etc.
5. Say nothing about termination and rely on ESA and common law

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Is There Any Good News?

Gracias v. Dr. Walt Dentistry (Ontario Superior Court 2022)

- Again, termination clause limiting employee to minimum entitlements under ESA
- Same result due to effect of just cause clause (*Waksdale*)
- Good news is that, contrary to assertion of most plaintiff's side lawyers these days, effect of COVID-19 does not automatically justify longer common reasonable notice period

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Gracias v. Dr. Walt Dentistry - Facts

- Gracias terminated in March 2020
- Court noted that effect of COVID-19 on labour market not consistent across sectors
- Dependent on individualized evidence in particular case
- In Gracias's case, evidence led that the job market in employee's profession strong and therefore longer notice period not warranted
- In conformity with case law in *Yee v. Hudson's Bay Company* (December 2020)

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➢By contrast, court in *Iriotakis v. Peninsula Employment Services Limited* (February 2021) provided longer notice period in context of pandemic but did not explain to what extent age and pandemic had individually increased notice awarded

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➢Employers should not assume that employees terminated during pandemic or seeking work during pandemic will automatically recover more than would have but for pandemic

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Thank you!

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Sky High Fines, More Delays and New OHSA Sentencing Factors

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Working for Workers Act, 2022

Major changes to the OHSA in the areas of maximum fines, limitation periods, sentencing factors, washroom access and naloxone kits

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Increase to Maximum Fines

The legislation raises the maximum fine for individuals from $100,000 to $500,000 per count.

For officers and directors, the maximum fine has increased to $1,500,000 per count, a 15-fold increase, which is the same maximum fine that may be imposed against corporations

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Increase to Maximum Fines

The increase to the maximum fine for officers and directors should put senior executives on notice that the government is signaling that fines should dramatically increased in prosecutions of corporate officers and directors.

We expect prosecutors to argue that the Legislature wants executives to face fines which are in a similar range to the fines for corporations.

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Increase to Maximum Fines

Some Courts have recently signaled that an increase in the maximum fines should result in an increase to the range of penalties imposed (*see R. v Hoyeck* and *R. v Gibson Energy ULC*).

Others have held that an increase to the maximum fine does not necessarily require an increase in fines imposed against all offenders (see *R. v Carrier Forest Products Ltd.*)

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Increase to Maximum Fines

There is no prohibition on a corporate entity indemnifying an individual for the cost of a fine imposed by a Court.

For officers and directors, it may be prudent to seek indemnification language for fines and legal costs associated with charges.

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Limitation Period Increase

The government has increased the limitation period for laying charges under the OHSA be increased from 1 year to 2 years.

Prosecutors often lay charges right before the limitation period expires. It remains to be seen whether it will become commonplace for it to take longer for charges to be laid.

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Limitation Period Increase

Legal controversy on the issue of what point the Ministry is required to rely on inspection powers. Possible risk of Ministry relying on inspection powers for an extended period.

This could also mean that the time between the date of the accident and the trial could be much longer. Opens to door to question of whether an accused can raise issues of pre-charge delay.

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The Traditional Sentencing Factors- The Court of Appeal's Famous Decision in R v. Cotton Felts

The amount of the fine will be determined by a complex of considerations including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence ...

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The Sentencing Factors that Courts Must Consider

1. The offence resulted in the death, serious injury or illness of one or more workers
2. The defendant committed the offence recklessly.
3. The defendant disregarded an order of an inspector.
4. The defendant was previously convicted of an offence under this or another Act.

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The Sentencing Factors that Courts Must Consider

5. The defendant has a record of prior non-compliance with this Act or the regulations.
6. The defendant lacks remorse.
7. There is an element of moral blameworthiness to the defendant's conduct.
8. In committing the offence, the defendant was motivated by a desire to increase revenue or decrease costs

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The Sentencing Factors that Courts Must Consider

9. After the commission of the offence, the defendant,
   a) attempted to conceal the commission of the offence from the Ministry or other public authorities
   b) failed to co-operate with the Ministry or other public authorities.

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The Sentencing Factors that Courts Must Consider

9. After the commission of the offence, the defendant,

   c) attempted to conceal the commission of the offence from the Ministry or other public authorities

      i. Failing to notify the Ministry of an accident where required to do so, disturbing the scene, and obstructing an Inspector are offences which are routinely prosecuted by the Ministry. Clearly, it would be inappropriate to punish employers for exercising their constitutional rights to make full answer and defense or for relying on a legally recognized privilege.

   d) failed to co-operate with the Ministry or other public authorities.

      i. This provision could be highly problematic. Certainly, an employer that cooperates fully with the investigation should be entitled to have such cooperation recognized by a Court as a mitigating factor. However, a failure to cooperate outside the context of a clear legal obligation to do so may be unconstitutional. Coupled with a doubling of the limitations period and potentially extended "inspections," employers may effectively lose the right to remain silent altogether.

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New Obligations for Naloxone Kits and Training in the Workplace

- The provisions require where an employer becomes aware, or ought reasonably to be aware, that there may be a risk of a worker having an opioid overdose at a workplace, the employer is required to have a naloxone kit present at the workplace.
- The proposed legislation sets out various obligations related to training of workers and storage of the kits.
- Not yet proclaimed into law

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New Obligations for Naloxone Kits and Training in the Workplace

- This amendment has generated much discussion about how an employer is supposed to assess this risk
- Ontario law places strict limits on the rights of employers to seek medical information from employees
- Ontario law places strict limits on the rights of employer to conduct random drug testing
- The OHSA has historically been silent on the hazards associated with substance abuse. Does more need to be done?

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Washroom Access for Delivery Workers

Duties of owners — washroom access

29.1 (1) Subject to subsection (2), the owner of a workplace shall ensure that access to a washroom is provided, on request, to a worker who is present at the workplace to deliver anything to the workplace, or to collect anything from the workplace for delivery elsewhere.

Exceptions

a) (a) if providing access would not be reasonable or practical for reasons relating to the health or safety of any person at the workplace, including the worker who requests to use a washroom;
b) (b) if providing access would not be reasonable or practical having regard to all the circumstances, including, but not limited to, the nature of the workplace, the type of work at the workplace, the conditions of work at the workplace, the security of any person at the workplace and the location of the washroom within the workplace; or
c) (c) if the washroom is in, or can only be accessed through, a dwelling

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Washroom Access for Delivery Workers

- “Owner” under the OHSA is broadly defined
- The exceptions about what is “reasonable or practical” would likely benefit from the input or the JHSC
- It is recommended that employers generate a policy on this issue
- Be wary of potential human rights issues arising out of this section

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- There is a good chance that Prosecutors will seek higher penalties against individuals
- Prosecutions against Officers and Directors may be more common
- Important to challenge questionable orders from Inspectors
- It will likely take longer for charges to be laid and brought to trial
- Legal advice essential with respect to cooperation issue

Practical Thoughts

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Thank you!

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Quiet Quitting: What Can Employers Do About It?

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What is Quiet Quitting?

- Employee not engaged in work or doing the minimum
- Examples:
  - On phone/surfing internet rather than working
  - Distracted during meetings
  - Remote workers dealing with personal matters or simply not doing anything during working time
  - Delayed response or non-response to communications

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Is Quiet Quitting Real?

- Gallup:
  - "Quiet quitters" make up at least 50% of U.S. workforce
  - "Engaged" workers only 32%
  - "Actively engaged" only 18%
  - Drop in engagement began second half of 2021
  - Younger workers less engaged

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Causes of Quiet Quitting

- Lack of clarity about expectations
- Lack of opportunities to learn and grow
- Not feeling cared about
- No connection to the organization's mission or purpose
- Remote/hybrid work likely a contributing factor

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Options for Dealing with Quiet Quitters

- Try to increase engagement:
  - Meetings
  - Set goals
  - Build sense of team
- Monitoring of performance
- Performance Improvement Plans
- Warnings
- Termination

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Electronic Monitoring of Performance

- Purpose and type should be covered in your policy
- Time of day employee logins and off
- Activity levels
- Email: do not read personal emails
- Internet usage

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Non-Electronic Monitoring of Performance

- In person engagement
- "Over the shoulder"
- Video surveillance
- Risk of overdoing it:
  - Discrimination claim
  - Harassment or toxic workplace complaint
  - Constructive dismissal claim

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Performance Improvement Plan

- Set clear objectives
- Reasonable timeframe for achieving objectives
- Ask if any reason why not meeting objectives
- Follow up

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Written Warning and Progressive Discipline

- Be clear as to the performance shortcoming
- Set expectation going forward
- Advise will be further discipline and possible termination if performance does not improve

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Termination

- Be mindful of potential human rights claim risks
- Be clear and upfront about the reason
- Give some specific examples in the termination letter

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Just Cause for Quiet Quitting?

- Just cause may exist for poor performance or insubordination
- Courts apply "contextual analysis"
- High bar: must amount to repudiation of employment or "fundamental breach"
- Must be prior warnings

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Baker v. Weyerhaeuser (BC)

- Series of incidents of poor performance
- Employee received written warning, but no "final warning"
- Employee had positive performance reviews
- Employer failed to follow own progressive discipline policy
- No just cause

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Daniels v. Canadian Gift and Table (2003)

- Number of incidents of insubordinate conduct and poor performance
  - Challenging manager's authority
  - Avoiding manager
  - Leaving a meeting
  - Absent for 5 days without explanation
  - Given clear written warning

Court:

- Employers have a "duty to warn" before terminating for just cause
- Employee must be given reasonable opportunity to improve
- Cumulative effect of poor performance amounted to just cause

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Buchanan v. Word Communications (1990)

- Performance unsatisfactory for long time
- Told verbally performance not satisfactory and reason for only nominal salary increases

Court:

- Warnings were not sufficient – not clear enough
- Employer didn't treat poor performance as a "fundamental breach"

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Employment Standards Act, 200

- Standard for disqualification to notice of termination/severance pay different from "just cause" under the common law
  - "Wilful misconduct"
  - "Wilful neglect of duty that is not trivial and has not been condoned by the employer"

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Sacco v. MMCC Solutions Canada

- Employee had 7 years of good performance
- Employee received purposed "last chance agreement"
- Employee then received a "final warning" for falsifying records
- Employee terminated a month later

OLRB:

- Employee not guilty of wilful misconduct
- Poor performance also not "wilful"

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Thank you!

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The *Employment Standards Act* in 2022: Legislative and Case Law Developments

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The *Employment Standards Act* in 2022

Amendments

- The *Working for Workers Act, 2021*
  - Restricts non-compete agreements
  - Requires policy on disconnecting from work
- *Working for Workers Act,* 2022
  - Requires policy on electronic monitoring
  - Enacts "protections" for digital platform workers

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Case Law Developments

- Infectious Disease Emergency Leave: Leave or Layoff?
- The severance pay threshold: local or global payroll?

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Working for Workers Act, 2021

1. **Non-competes Unenforceable**

- "no employer shall enter into an employment contract…that includes a non-compete agreement"
- A non-compete agreement means an agreement that "prohibits the employee from engaging in any business, work, occupation, profession, projects, or other activity that is in competition with the employers' business" [emphasis added]

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Working for Workers Act, 2021

1. Non-competes Unenforceable

- Exception:
  - "Executives" meaning: CEO, CFO, CAO, CIO, CLO, CHRO, President, or other chief executive position
  - Business transfers where the seller becomes an employee of the purchaser

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Working for Workers Act, 2021

1. Non-competes Unenforceable

- Concerns:
  - By including this provision in the *Employment Standards Act* it is subject to a "generous and purposive interpretation"
  - Will the prohibition apply to non-solicitation agreements?
- Silver Linings:
  - The provision does not affect provisions concerning confidential information
  - The amendments do not apply retrospectively – see *Parekh et al v. Schecter et al* (2022), (ONSC), and *MGP Drug Mart Inc.* (2022), (ONCA)

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Working for Workers Act, 2021

2. **The Right to Disconnect**

- Applies to employers with 25 or more employees
- Requires a written policy with respect to disconnecting from work
- Disconnecting from work means: "not engaging in work-related communications, including emails, telephone calls, video calls or sending or receiving other messages, so as to be free from the performance of work"

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Working for Workers Act, 2021

2. The Right to Disconnect

- The *ESA* does not address when employees should disconnect
- The *ESA* does not exclude "exempt" employees like managers and professionals
- The *ESA* does not require employers to prohibit work "after hours"
- The *ESA* does not provide any consequences for employers that breach the policy

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Working for Workers Act, 2022

Electronic Monitoring Policies

- Employers with 25 or more employees must have a written electronic monitoring policy.
- The policy must address:

1. Whether the employer electronically monitors its employees
2. When and how the employer monitors its employees
3. The purposes for which information obtained through electronic monitoring may be used by the employer

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Working for Workers Act, 2022

Electronic Monitoring Policies

- The amendments do not affect or limit the employer's ability to use the information obtained
- Complaints may only be made with respect to an employer's obligation to provide copies of the relevant policy to current, new, or assignment employees.

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Working for Workers Act, 2022

Ministry of Labour Guidelines

- Examples of electronic monitoring:
  - The use of GPS to track workers
  - Electronic sensors to track productivity
  - Tracking website visits
- The amendments do not:
  - Establish the right to not be monitored
  - Create new privacy rights
  - Restrict the employer's right to use information obtained through electronic monitoring

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Working for Workers Act, 2022

Digital Platform Workers Act

Background

- UBER required service providers to sign an arbitration agreement governed by Dutch law and justiciable in The Netherlands
- $14,500.00 arbitration fee
- Applicant sought a declaration that the arbitration agreement was unenforceable thereby permitting a class action alleging violations of the *Employment Standards Act*
- SCC: The arbitration agreement was unenforceable because it was unconscionable due to unequal bargaining power and impeded access to justice

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Working for Workers Act, 2022

Digital Platform Workers Rights Act

- Concerns the rights of workers engaged in rideshare, delivery, courier, or other services using digital platforms
- Does not confer status as an employee

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Working for Workers Act, 2022

Digital Platform Workers Rights Act

- Worker Rights:
  - Regular pay period
  - Information concerning the calculation of pay and tips, the allocation of assignments, effect of reviews, and performance ratings
  - Minimum wage for each assignment
  - Two weeks notice of removal, with reasons, except in cases of willful misconduct

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Legislative Amendments

Thoughts:

- The Legislature is filling perceived gaps in employment law created by technology and remote work
- Politicians of all stripes are identifying as pro-worker
- Many of these changes are unnecessary and unwanted

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Case Law Developments

IDEL: Leave of layoff?

- Ontario amended the *ESA* in early 2020 to provide for deemed Infectious Disease Emergency Leave (IDEL) in early 2020
- IDEL specifically deemed a layoff due to Covid-19 to be a job protected leave, not a layoff
- IDEL revoked effective July 20, 2022

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Case Law Developments

IDEL: Leave or layoff?

- Issue: Does the legislation protect employers from constructive dismissal claims at common law?
- Constructive dismissal occurs at common law when an employer lays off an employee without an express or implicit right to do so – see *Chen v. Sigpo Wireless Inc.* (2005), (ONCA)
- The deemed IDEL regulations specifically said that employees on deemed IDEL are not constructively dismissed
- Would the common law courts apply this provision to block constructive dismissal actions?

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Case Law Developments

IDEL: Leave or layoff

Coutinho v. Ocular Health Centre Ltd. (2021), (ONSC)

- The court held that the deemed IDEL provision did not affect the right of an employee placed on deemed IDEL leave to sue for constructive dismissal
- The court relied on section 8 of the *ESA* which states the *ESA* does not affect an employee's right to civil remedies
- Followed in *Fogelman v. IFG* (2021), (ONSC)

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Case Law Developments

IDEL: Leave or layoff

Taylor v. Haley Hospitality Inc. (2021), (ONSC)

- The court rejected *Coutinho* finding that the interpretation in that case rendered the deemed IDEL provisions meaningless and produced an absurd result
- Employees cannot be both constructively dismissed and on deemed IDEL
- The *ESA* can extinguish a common law right

➢ *Taylor* was appealed to the Court of Appeal, but the court did not resolve the conflict with *Coutinho* and *Fogelman*

➢ *Taylor* was overturned on procedural grounds

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Case Law Developments

Statutory Severance Pay and Global Payroll

- Under the *ESA* employers with a payroll of at least $2.5M must provide statutory severance pay to employees with 5 years of service or more
- Until recently, the courts and OLRB have held that only an employer's Ontario payroll is relevant for determining the $2.5M threshold
- This was challenged before the Ontario Divisional Court in *Hawkes v. Max Aicher (North America) Limited* (2021)

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Case Law Developments

Statutory Severance Pay and Global Payroll

- In *Hawkes,* the employer was a large multi-national steel company with a global payroll far in excess of $2.5M
- It had a small footprint in Ontario, with an Ontario payroll less than $2.5M
- The Ministry of Labour and OLRB denied the employee's claim for severance pay because the *ESA* only regulates Ontario based employment

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Case Law Developments

Statutory Severance Pay and Global Payroll

The Divisional Court held the employee was entitled to severance pay because:

- The *ESA* is public welfare legislation that requires a broad interpretation
- Previous precedents rested on a flimsy foundation
- The purpose of limiting severance pay to employers with a small payroll was to protect small employers, not global conglomerates

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Case Law Developments

Statutory Severance Pay and Global Payroll

- Branch locations are now exposed to greater liability under the *ESA*
- The related employer provisions of the *ESA* may become an issue in more *ESA* investigations

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The *Employment Standards Act* in 2022

Closing Thoughts?

- The *ESA* has become a pillar of Ontario employment law
- Government is using it to change the common law, address technological change, and influence the employer policy making process
- The courts are applying both restrictive and expansive interpretations depending on the circumstances, to benefit employees

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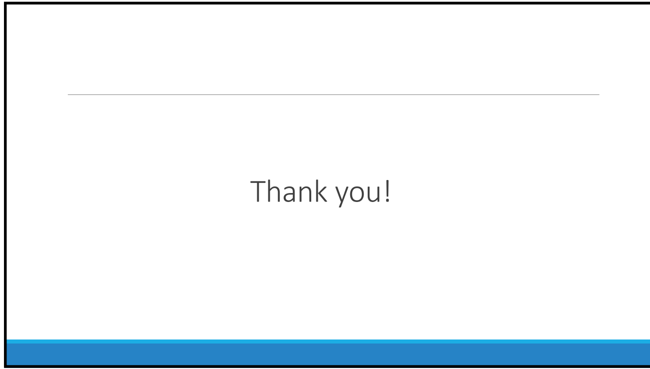

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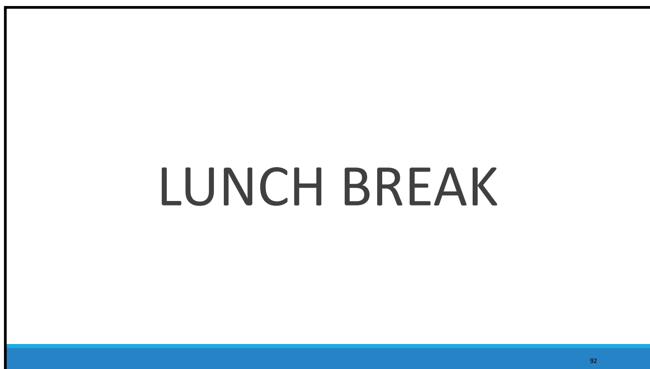

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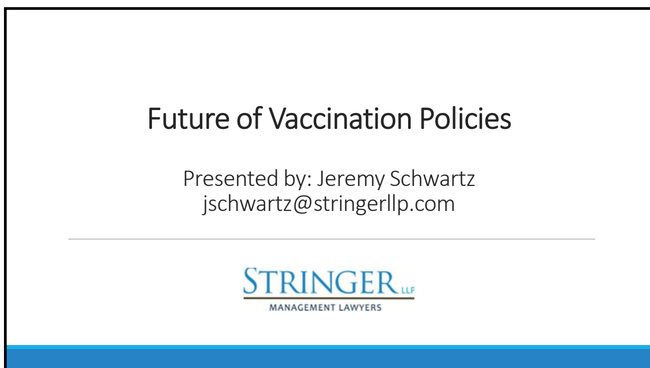

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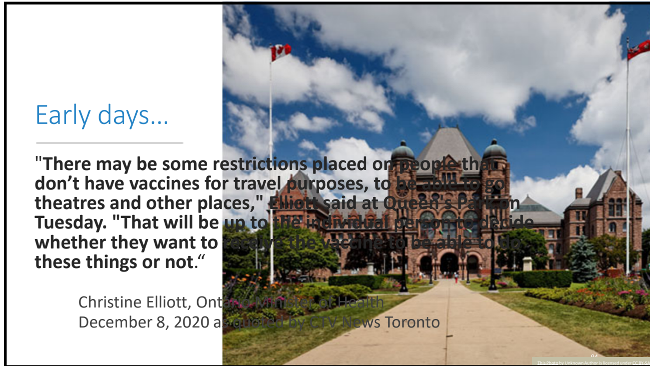

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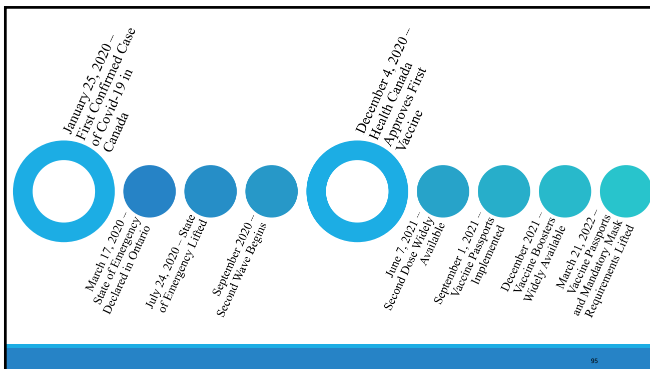

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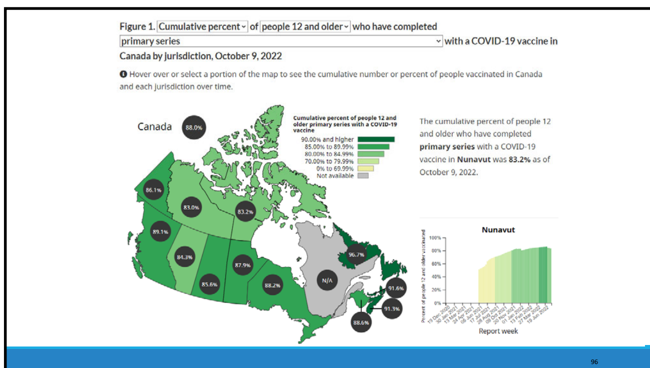

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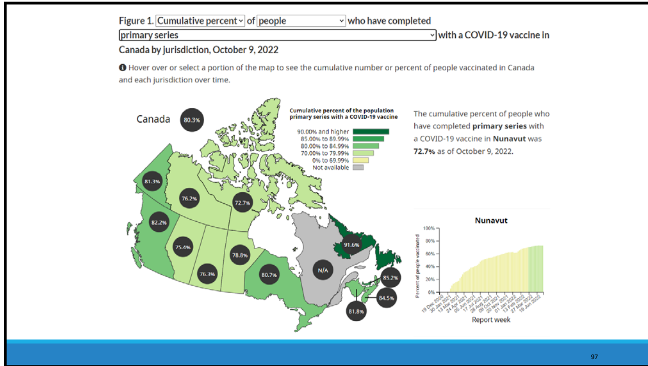

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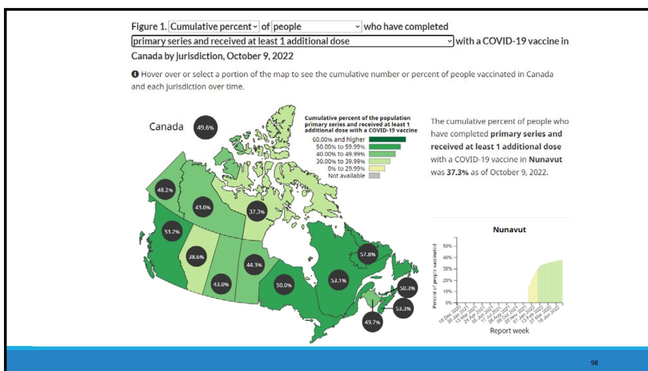

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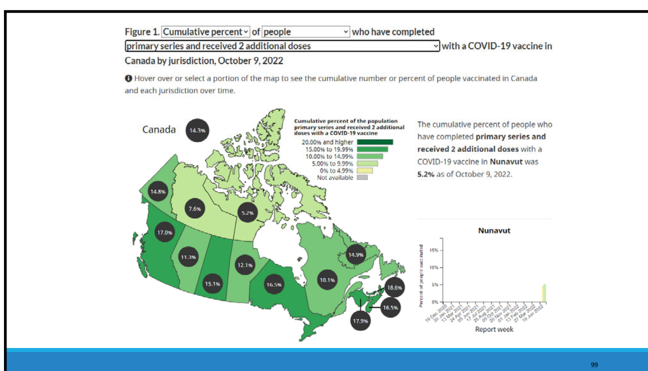

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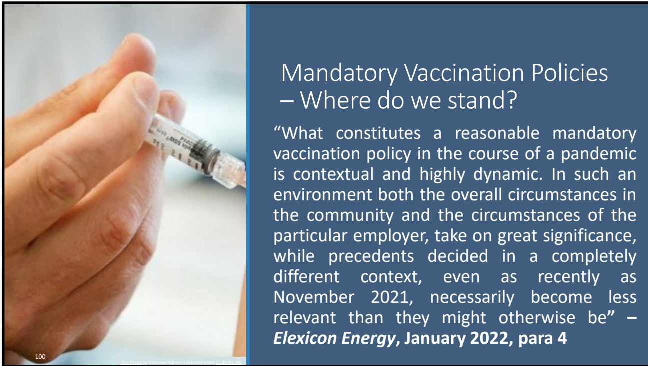

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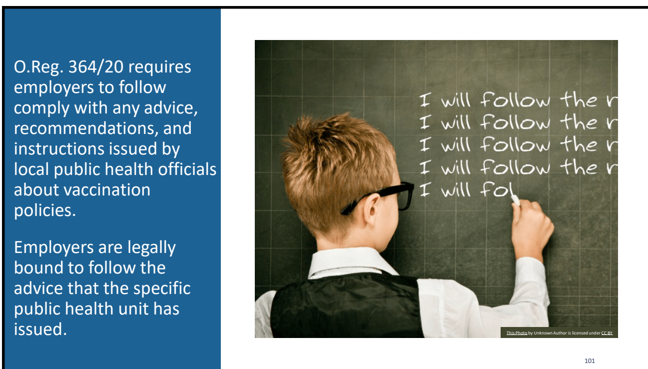

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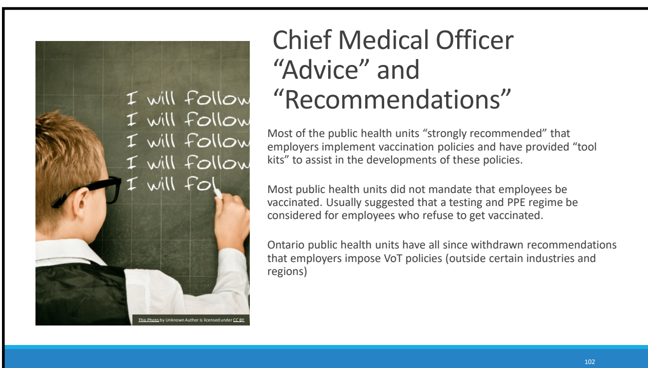

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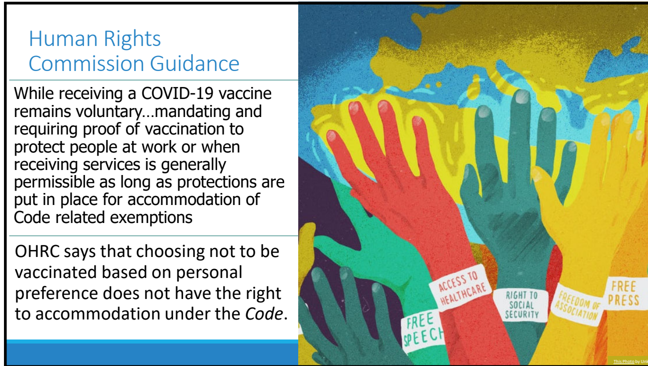

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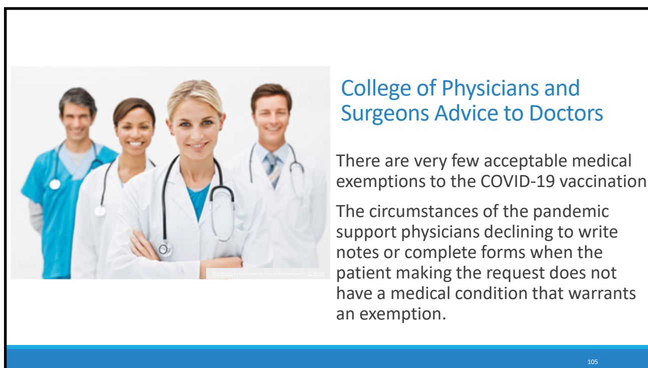

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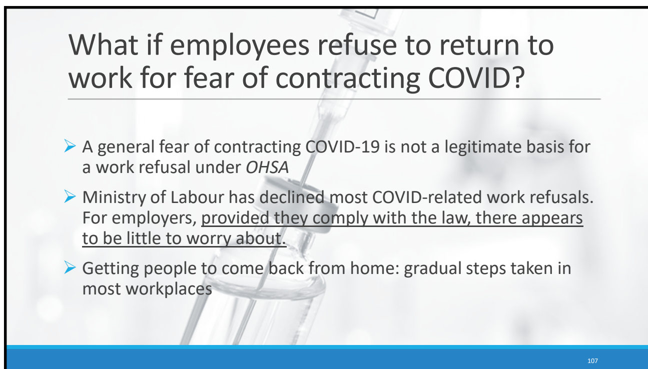

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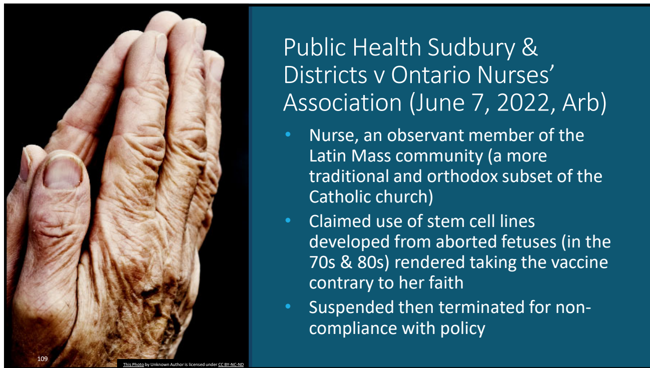

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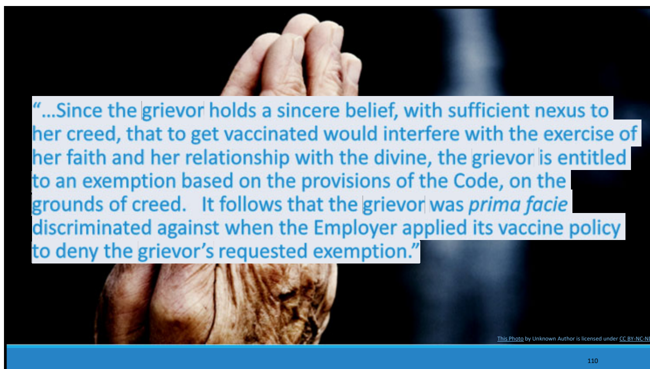

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UFCW, local 333 and Paragon Protection Limited (November 9, 2021)

"I find that receiving the COVID-19 vaccine is voluntary…I find that personal subjective perceptions of employees to be exempted from vaccinations cannot override or displace available scientific considerations."

The company is taking "every precaution reasonable in the circumstances" per section 25(2)(h) of the OHSA

The vaccination policy is reasonable, in that it strikes an appropriate balance between affected employees, other staff, and client location staff and public

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Bunge Hamilton Canada and UFCW, Local 175

(January 4, 2022, Arb)

- ER operated two food oil refining facilities on land leased from the Federal government at the Port of Hamilton
- The Federal government prohibited unvaccinated persons from entering the port lands
- Arbitrator upheld ER's mandatory vaccination policy because the employer would not be able to operate its business otherwise

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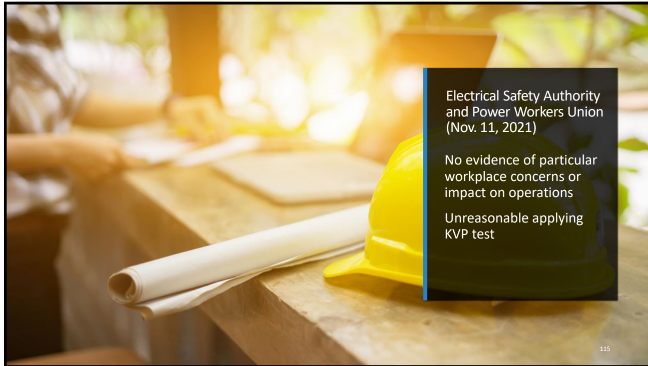

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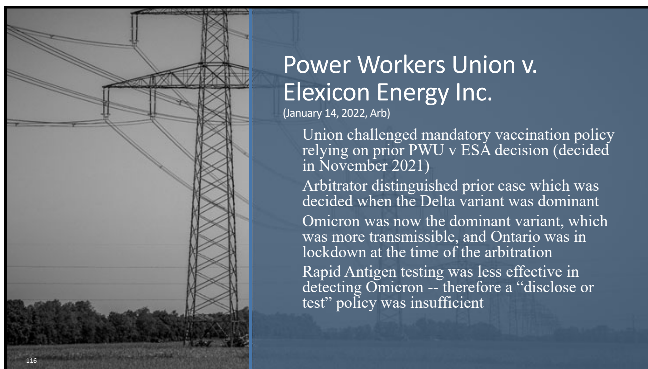

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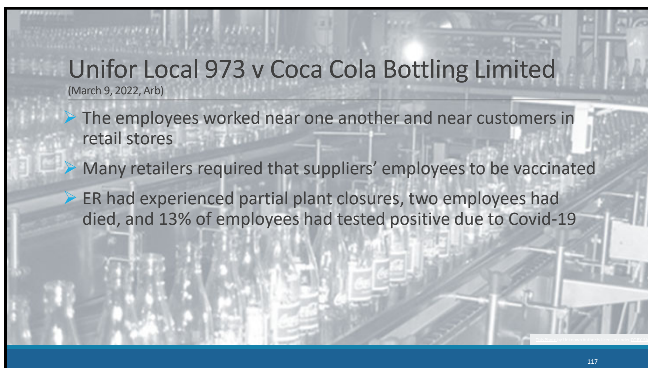

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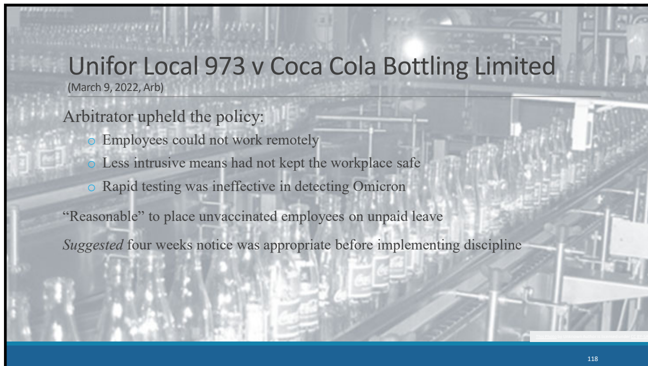

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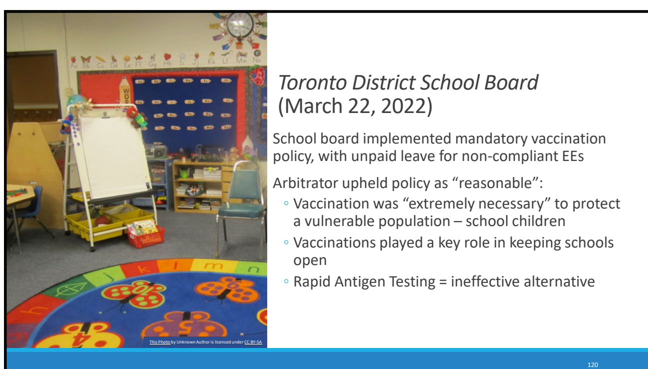

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Toronto District School Board
(March 22, 2022)

"Once the vaccines arrived, and were determined safe and effective, the paradigm shifted …It would be derelict to ignore the vaccines and the benefit of full vaccination and pretend that they were not a real game-changer in giving effect to the TDSB's statutory obligations. The precautionary principle requires that employees like the TDSB … do whatever they reasonably can."

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Parmar v Tribe Management Inc.

(September 26, 2022, BC SC)

- First civil case on mandatory vaccination or unpaid leave policy
- Property management company implemented mandatory vaccination policy
- EE refused to vaccinate (no exemption), placed on unpaid leave per policy
- EE resigned and sued, alleging constructive dismissal
- Court found policy was reasonable, so the employee was not constructively dismissed

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Court held mandatory vaccination policy did not force people to get vaccinated; rather, such policies impose:

"…a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income…"

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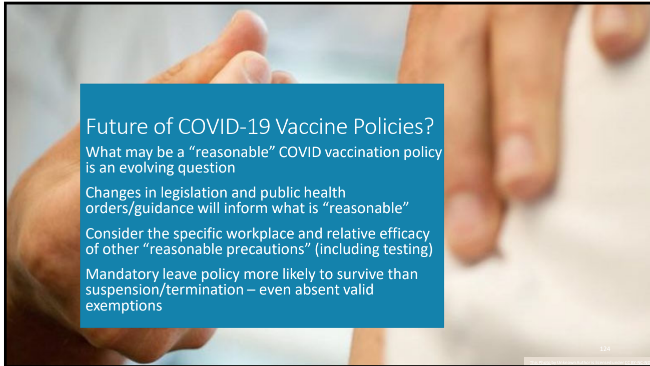

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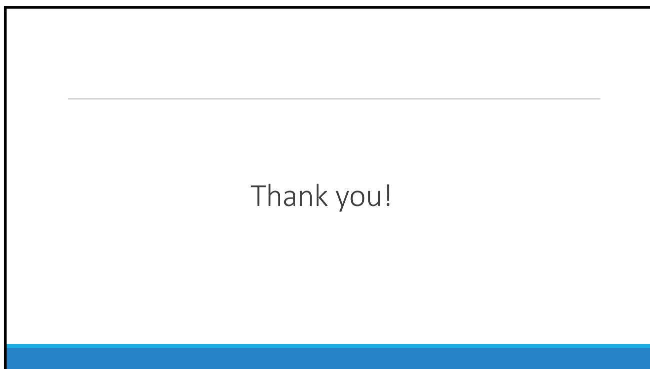

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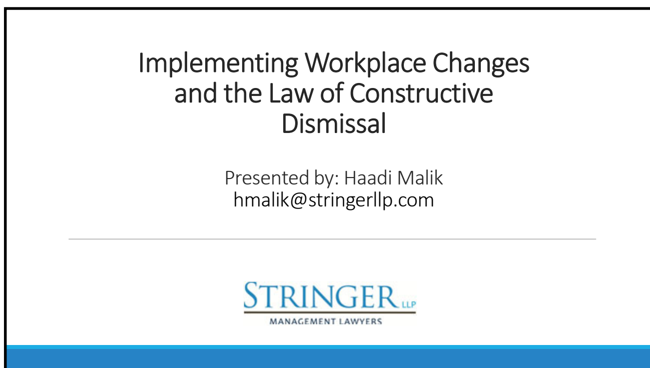

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What is Constructive Dismissal? *Farber v. National Trust*, [1997] 1 SCR 846

"Where an employer decides **unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job**, **the employee has not resigned, but has been dismissed. Since** the employer has **not formally dismissed** the employee, this is **referred to as "constructive dismissal". "**

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Wronko v. Western Inventory Service Ltd. 2008 ONCA 327

"First, the employee may **accept the change** in the terms of employment, **either expressly or implicitly through apparent acquiescence**, in which case the employment will continue under the altered terms.

Second, the employee may **reject the change and sue for damages** if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in *Farber. . .*

Third, the employee may **make it clear to the employer that he or she is rejecting the new term**. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract."

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Potter v. New Brunswick Legal Aid Services Commission (SCC 2015): Two step test

(1) determine whether employer has changed contract unilaterally and detrimentally

- If employer has express or implied right to change, or if employee consents to or acquiesces in change, no breach/no constructive dismissal
- If no right, consent or acquiescence, go to step 2

(2) determine if reasonable person in same situation as employee would feel essential terms of contract substantially changed

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Some examples of Constructive Dismissals

- A significant reduction in compensation (likely more than 10-14%)
- A temporary layoff where the employer has no contractual right of layoff
- Demotion, elimination of position/transfer, significant change in job duties, change in reporting structure (i.e., employee is required to report to someone who was their subordinate)
- Workplace harassment and bullying (poisoned work environment)

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Case Study: *Filice v. Complex Services Inc.*, 2018 ONCA 625

- Employee was a security shift supervisor at a casino. Suspended without pay because of a provincial gaming commission inquiry into inconsistencies in the resort's lost and found record.
- Evidence available suggested that the employer suspended the employee prematurely without conducting a proper preliminary investigation.
- Finding:
  - insufficient reason for a suspension without pay when the decision was made during the early phases of the inquiry
  - employer unilaterally altered the work relationship and therefore breached an implied **requirement of the employment contract of good faith and fair dealing** that the power to suspend without pay would not be exercised arbitrarily.

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What is Acquiescence?

- Inference of permission or consent arising when a person raises no objection to/takes no action over infringement of legal right by another
- In effect, consent is inferred from silence over time

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How Long is Too Long?

- *Lancia v. Park Dentistry* – 13-month delay in bringing claim after resigning too long
- *Kurt v. Idera Inc.* - 6 months long enough for motions judge but decision overturned because judge failed to determine whether contract permitted layoff or not ie. skipped step 1
- *Obiter*, said that two years would be too long
- But *McGuinty v. 1845035 Ontario Inc.* – two-year delay from leaving work due to mental condition to suing not too long, since delay based on same issue as absence ie. anxiety and depression
- In general, up to 6 months should be sufficient for employee to decide to challenge or not

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Constructive Dismissal and Vaccination

- As of August 24, 2021 employers required to comply with "advice, recommendations and instructions" of local Medical Office of Health
- Not merely compliance with orders
- Where recommendations included having vaccination policy mandating vaccination, as in Toronto, Peel etc., employers required to comply as a matter of health and safety law
- Employers could choose to terminate employees for refusal to comply (although whether with cause yet to be decided)
- Subject to Human rights considerations (disability)

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- Many employers provided alternatives such as daily rapid testing (often at own expense) or unpaid leaves of absence
- The same considerations re constructive dismissal apply to such leaves – including acquiescence

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- Question is what battle employer prefers to fight
- May be better for employer to argue that was entitled, for health and safety reasons, to mandate vaccination for everyone (subject to human rights exemptions), especially if members of the workforce were especially vulnerable, than that had right to put employees on unpaid leave ie. to permit them not to comply
- That option may weaken employer's position

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- Leave of absence does not actually solve underlying question, just delays answer
- At end of leave of absence, vaccination still important? Or has the reopening of the pandemic, and reduction of public health restrictions changed this?
- But, while COVID-19 has changed, has not disappeared
- Argument for vaccination now based largely on reducing transmission/absenteeism unless workforce particularly susceptible

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Good news out of BC: *Parmar v Tribe Management Inc.,* 2022 BCSC 1675

- Employee placed on unpaid leave of absence for failing to comply with employer's vaccination policy
- First civil claim to hear whether placing an employee on an unpaid leave for non-vaccination = constructive dismissal.
- Key factors:
  - Employee' leave was for a period of three months and was subject to review;
  - she was not replaced;
  - she was asked to return some employer property; she continued to receive certain employee benefits; and
  - the employer did not intend to terminate her employment, as she was expected to fulfill a new role and was a valued employee.

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Cont.: *Parmer v Tribe Management Inc.*

"***The assessment of the reasonableness of Tribe's MVP must be considered based on the state of knowledge about COVID-19 at the time it was implemented [November 2021]. Approaches to managing the pandemic have evolved as more information became available and as the effectiveness of vaccines became known.***" **(Para 101)**

Finding:

1. The policy was reasonable given the "extraordinary health challenges" posed by COVID (para 154)
2. Employee was not "forced" to get the vaccinate; choice was between vaccination and continuing to have income or non-vaccination and losing income. This was a choice made by the employee (para 156).

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Constructive Dismissal and Return to Office

- Since March 2020 many employees have worked from home based on mandate or recommendation by government
- Employers may not have been explicit that was temporary only
- But given pandemic, arguably inherently temporary

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- Many employees prefer to work from home due to childcare considerations, commute, etc.
- Some may argue that terms and conditions of employment relative to location changed permanently

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- Improbable that temporary measures either legally mandated or strongly recommended will be viewed as permanent change
- But be careful not to create, inadvertently, new term and condition of employment regarding location
- In *Hagholm v. Coreio Inc.*, employee permitted to work from home 3 days per week for over 20 years, but required by new owner to return to office, held to be constructively dismissed

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- For this reason, if return to work is to be gradual, employer's communications should state that intention is complete return to office (assuming that is employer's decision) and that will be phased in gradually only for public health-related reasons

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- Employees failing to return when required are subject to termination for cause based on insubordination or abandonment, particularly if have chosen to move away during pandemic
- But if move expressly or implicitly approved by employer, court may hold that employer agreed to change of location
- Employer must be clear that employee expected to make necessary personal changes to comply when requested by employer

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- Strongly recommended that return to office phase-in not exceed a few months
- Even if employer proposes permitting some degree of working from home, permission should be subject to revocation at any time (subject to human rights accommodation)

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Damages for Constructive Dismissal

- Damages for constructive dismissal same as for wrongful dismissal ie. common law notice (subject to mitigation, other than statutory component) (*Michalski v. CIMA Canada Inc.*)
- Or, if enforceable, contractual clause
- Employee should accept recall and if fails to do so, fails to mitigate – no basis for arguing simple layoff too humiliating to return (*Gent v. Strone Inc*.)
- No reason generally why punitive damages should be awarded, short of abusive or uncivil behaviour by employer

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Mitigating Risk

- Review your employment contracts
  - enforceable termination clauses
  - allow expressly for certain fundamental changes – such as an express right of layoff.
- Listen to employee concerns, respond to them appropriately, and keep a written record of all communications.
  - Particularly important in workplace harassment situations
- If possible, give notice of changes
- If employee is alleging constructive dismissal, consider offering re-employment in writing

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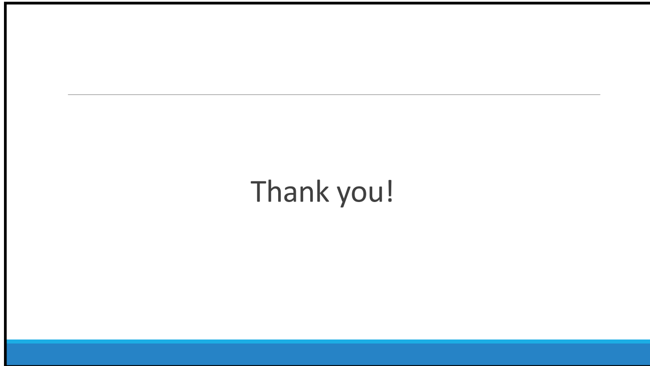

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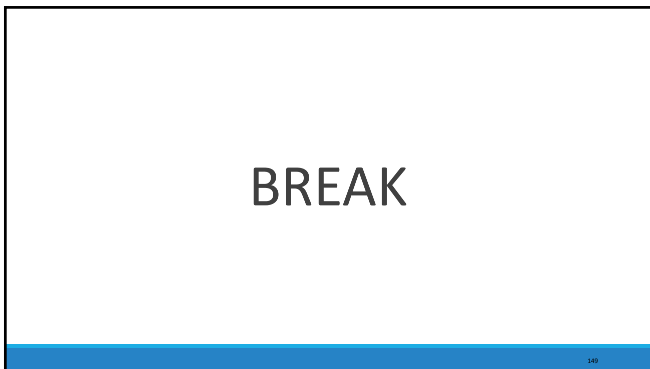

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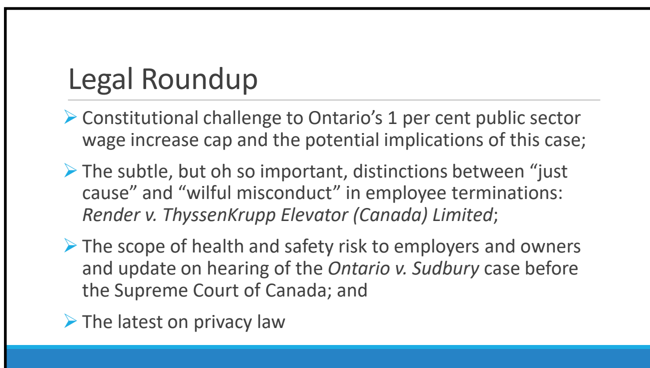

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