Annual Employment Law Update

November 13, 2024

Christine Ashton

Dan Condon

Wilson Vukelich LLP
Lawyers

Overview

- Each year there are amendments to legislation and case law decisions that impact your obligations, rights, and powers as an employer
- The purpose of today's webinar is to review a sampling of key legislative amendments and case law developments
- This webinar acts as a compliment to the issue specific seminars and webinars that we hold throughout the year
- This webinar touches on issues that impact all employers (unionized or not), for unionized employers, please note we hold a labour law update webinar in March each year
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal options and obligations

Agenda

1. Legislative Amendments
   i. Employment Standards Act – Minimum Wage
   ii. Employment Standards Act – Increased Fines
   iii. Employment Standards Act – Temporary Help Agency and Recruiter Licencing
   iv. Employment Standards Act – Medical Notes
   v. Employment Standards Act – Vacation Pay
   vi. Employment Standards Act – Job Postings
   vii. Occupational Health and Safety Act – Remote Workplaces
   viii. Occupational Health and Safety Act – Digital Harassment and Digital Sexual Harassment
   ix. Canada Labour Code – Termination Entitlements
   x. Digital Platform Workers Rights Act

Agenda

2. Caselaw
   - A. Record Keeping
     - *Wirta Home Care Ltd. o/a Home Instead Senior Care v Patrick Bennett*
   - B. Workplace Searches
     - *York Region District School Board v. Elementary Teachers' Federation of Ontario*
   - C. Terminations: Psychological Injury
     - *Krmptoic v. Thunder Bay Electronics Ltd.*
   - D. Terminations: Enforceability Based on the Parties Intention
     - *Egan v. Harbour Air Seaplanes LLP*
   - E. Terminations: Enforceability Based on Proper Language
     - *Bertsch v. Datastealth Inc.*
   - F. Terminations: Fixed Term Agreements
     - *Copy v. Losani Homes*
   - G. Independent Medical Examinations
     - *Marshall v. Mercantile*
   - H. Non-Competition Agreements
     - *EF Institute v. WorldStride*
   - I. OHSA Penalties
     - *Eastway Tank*
   - J. Owner Responsibility under the OHSA
     - *R. v. Greater Sudbury*

1)i) Legislative Amendments: Employment Standards Act – Minimum Wage

- Under the Ontario **Employment Standards Act, 2000** ("ESA"), Ontario's minimum wage increases annually based on the Ontario Consumer Price Index ("CPI")
- Most recently, the CPI rose by 3.9 per cent, resulting in an increase in the General Minimum Wage of 65 cents an hour, to $17.20 effective on October 1, 2024
- The Student Minimum Wage was increased to $16.20 per hour
- The Homeworker Minimum Wage was increased to $18.90 per hour
- In 2023 there were 935,600 workers earning at or below $17.20 per hour
- Ontario now has the second highest provincial General Minimum Wage

1)ii) Legislative Amendments: Employment Standards Act – Increased Fines

- The **Working for Workers Five Act, 2024** received Royal Assent on October 28, 2024
- This Act made many amendments to employment related legislations, including the ESA
- The amendments to the ESA included increasing the maximum fine for an individual convicted of an offence under the ESA or its Regulations from $50,000.00 to $100,000.00
- Also, O. Reg 289/01 was amended to increase the penalty for repeat offenders who contravene the same ESA provision three or more times from $1,000.00 to $5,000.00

1)iii) Legislative Amendments: Employment Standards Act – Temporary Help Agency and Recruiter Licensing

- Amendments made to the ESA in 2023 required that temporary help agencies ("THA") and recruiters operating in Ontario be licensed effective January 1, 2024
- This deadline for licensing was subsequently extended to July 1, 2024
- As part of the licensing process, THAs and recruiters were required to provide a $25,000.00 irrevocable line of credit
- This requirement was concerning to many in the industry
- On April 29, 2024, the Provincial Government introduced a regulatory amendment to address this and other concerns regarding the licensing process

1)iii) Legislative Amendments: Employment Standards Act – Temporary Help Agency and Recruiter Licensing

- As a result, in addition to an irrevocable line of credit, THAs and recruiters can now instead provide a $25,000 surety bond
- Also, when an organization applies for both a THA license and a Recruiter license, it will not have to pay duplicate fees or provide duplicate security
- Further, a recruiter will not be required to provide security if it will not recruit any foreign nationals or, if it is recruiting foreign nationals, it is only for positions with wages at or above the average median hourly wage as published on the Government of Canada website (at present, $28.39 per hour)

1)iv) Legislative Amendments: Employment Standards Act – Medical Notes

- On October 28, 2024, Bill 190, *Working for Workers Five Act, 2024*, received royal assent
- Under Bill 190, employers are now prohibited from requiring a medical note from a qualified health care provider (e.g. a doctor) when an employee seeks to take a sick leave
- There are though two important qualifications to this prohibition
- First, employers are still entitled under the ESA to ask for reasonable documentation to support a sick leave request
- If the employee then chooses to provide a doctor's note, it is fine to accept the same
- However, the employer should be open to other documents

1)iv) Legislative Amendments: Employment Standards Act – Medical Notes

- Second, employers are still entitled to ask for medical documents further to addressing obligations under the *Human Rights Code*
- An employer normally needs medical documentation (e.g. a completed medical questionnaire) confirming if accommodation is an option and what accommodation would be needed
- When an employee requests a leave of absence, it is important that the employer and the employee engage in an open dialogue, supported by medical documentation

1)v) Legislative Amendments: Employment Standards Act – Vacation Pay

- Generally, employees are entitled to vacation pay based on a percentage of earned wages and vacation days
- For example, an employee with 5 years of service is normally entitled to 6% vacation pay per year and 3 weeks of vacation days
- Employers normally address the accruing vacation pay by either paying it out when the employee takes their vacation or by paying it out with each paycheque
- Pursuant to Bill 149, *Working For Workers Four Act, 2024*, as of June 21, 2024, employers are only be able to pay out accrued vacation pay with each paycheque if they have the employees' written consent
- Otherwise, the employer will have to pay out the accrued vacation pay when the employee takes their vacation or when it becomes immediately due (e.g. when the employee quits)

1)v) Legislative Amendments: Employment Standards Act – Vacation Pay

- As a result of this amendment, employers should ensure that their employment agreements and their employee handbooks all confirm the agreed upon practice for paying out vacation pay
- The vacation provision of the employee handbook should also further define and limit your obligations as an employer
- For example, it should confirm that vacation pay is based on wages, if you do not wish for vacation pay to accumulate during a leave
- Further, it should confirm when earned and unpaid vacation pay will be paid out at the latest, to avoid a potential claim for more than 2 years' worth of vacation pay

1)vi) Legislative Amendments: Employment Standards Act – Job Postings

- Back in March 2024, the fourth wave of employment law changes (Bill 149, *Working For Workers Four Act, 2024*) received royal assent
- Under Bill 149 and on a date to be named, there are four forthcoming new requirements for public job postings:
  1. **Disclose the Salary Range:** Public job postings will soon be required to disclose the salary/wage range for the advertised position. Pursuant to the amendments, the government can introduce regulation that will create exceptions for this requirement and provide further details about this requirement.
  2. **Disclose Any Use of AI.** Employers will soon be required to reveal in job postings if they use AI during the hiring process. This would include using AI to screen applications, using AI to assess interview answers, etc.
  3. **Do Not Require Canadian Work Experience.** Employers will soon be prohibited from requiring Canadian work experience from its potential applicants. As such, no public job posting should include a reference to preferring candidates with Canadian work experience. Of course, employers will remain able to consider Canadian work experience, subject to the *Human Right Code*.
  4. **Keep a Copy of the Job Posting.** Employers will soon be required to keep a copy of all public job postings for at least three years. While the planned legislative retention period is only three years, employers may wish to keep a record of job postings for longer. The record of a job posting can play an important role in employment litigation, including confirming the parties' understanding of the role's duties and responsibilities.

1)vi) Legislative Amendments: Employment Standards Act – Job Postings

- As a result of Bill 190, *Working for Workers Five Act, 2024*, there is now a fifth forthcoming new requirement for public job postings:
  5. **Disclose Whether the Position is Vacant.** Employers will soon be required to say if they are advertising a position that has an existing vacancy. As such, employers will need to disclose if they currently have an employee in that position (who is assumably quitting or is about to be dismissed). Further, employers will need to disclose if the job posting is further to a current employee's leave of absence. It should be noted that the Ministry of Labour has not yet updated its Policy and Interpretation Manual to explain its position on this new obligation.
- The date for these new job posting requirements has not yet been identified
- It is understood that the Ontario Government is currently in consultations about rolling out these new requirements

1)vii) Legislative Amendments: Occupational Health and Safety Act – Remote Workplaces

- The OHSA establishes broad obligations that employers have to protect the health and safety of their workers
- These obligations include obligations to provide workers with appropriate training and equipment, obligations to properly identify and address workplace hazards, and obligations to prevent and respond to workplace accidents
- Pursuant to Bill 190, *Working for Workers Five Act, 2024*, the OHSA obligations now officially extend to private residences where telework is performed (i.e. remote workplaces)
- It cannot be understated how significant this amendment is
- Exactly what this amendment means though, will not be fully appreciated for months or years to come
- As a result of this amendment, employers should take the time to properly update their workplace health and safety policies, procedures, training, and practices to address remote workplaces.

1)viii) Legislative Amendments: Occupational Health and Safety Act – Digital Harassment and Digital Sexual Harassment

- Employers have multiple obligations in regard to workplace harassment and workplace sexual harassment under the OHSA
- These obligations include providing workplace harassment and workplace sexual harassment training, having workplace harassment and workplace sexual harassment policies and procedures, and responding to alleged incidents of workplace harassment and workplace sexual harassment
- Pursuant to Bill 190, *Working for Workers Five Act, 2024*, these obligations now extend to virtual/digital workplace harassment and workplace sexual harassment
- There are many ways in which workplace harassment and workplace sexual harassment can occur in a virtual or digital setting
- Examples include an employee engaging in workplace bullying during a Zoom team meeting, an employee using a workplace group chat to share discriminatory jokes, a supervisor sending sexual text messages to a subordinate, or a customer sending an employee an obscene image via the company website chat feature

1)viii) Legislative Amendments: Occupational Health and Safety Act – Digital Harassment and Digital Sexual Harassment

- As a result of this amendment, employers should take the time to properly update their workplace harassment and workplace sexual harassment policies and procedures
- Further, employers should provide updated training to their employees on virtual/digital workplace harassment and workplace sexual harassment
- Finally, employers should ensure that they adopt appropriate measures to prevent and address workplace harassment and workplace sexual harassment (e.g. monitoring the company's Facebook page).

1)ix) Legislative Amendments: Canada Labour Code – Termination Entitlements

- The Canada Labour Code ("CLC") applies to federally regulated employees
- Amendments to the CLC's individual termination provisions came into effect on February 1, 2024
- Prior to February 1, 2024, federally regulated employers were required to provide a minimum of two weeks notice of termination or two weeks pay in lieu of notice to an employee with at least three consecutive months of employment

1)ix) Legislative Amendments: Canada Labour Code – Termination Entitlements

- The amendments increased the individual termination entitlements as follows:

Less than 3 months of employment	No entitlement
3 months or more	2 weeks
3 years or more	3 weeks
4 years or more	4 weeks
5 years or more	5 weeks
6 years or more	6 weeks
7 years or more	7 weeks
8 years or more	8 weeks

1)ix) Legislative Amendments: Canada Labour Code – Termination Entitlements

- No changes were made to the CLC severance pay or group termination provisions
- Federally regulated employers are now also required to provide a terminated employee with a statement that summarizes the employee's entitlements as at the time of termination
- This includes accrued vacation pay, wages and their notice or pay in lieu of notice entitlements

1)x) Legislative Amendments: Digital Platform Workers Rights Act, 2022

- The Digital Platform Workers Rights Act, 2022 was enacted in April 2022 but was not declared in force at that time
- On September 5, 2024, the Provincial Government proclaimed that the Act and its Regulations will now come into effect on July 1, 2025
- The Act applies to workers who perform “digital platform work” in Ontario
- “Digital Platform Work” is defined as the provision of ride share, delivery, or courier services by a worker who is offered work assignments by an operator through the use of a digital platform

1)x) Legislative Amendments: Digital Platform Workers Rights Act, 2022

- The Act provides that digital platform workers must be paid at least the minimum wage as set out in the ESA
- Also, prior to removing a worker's access to an operator's digital platform, the operator must provide the digital platform worker with an explanation of why the access was removed and, if the removal is for a period beyond 24 hours, the operator must provide the worker with 2 weeks' notice of the removal unless the worker is being removed due to wilful misconduct, public safety concerns or if required by law
- Operators must provide the workers with information regarding their pay and work assignments
- The Act also requires that all disputes between an operator and a worker must be resolved in Ontario

2)A) Caselaw: Terminations: Fixed-Term Agreements

Wirta Home Care Ltd. o/a Home Instead Senior Care v Patrick Bennett

- In the matter of *Wirta Home Care Ltd. o/a Home Instead Senior Care v Patrick Bennett*, the employee worked as a bookkeeper and his scheduled hours of work were 8:30 a.m. to 5:00 p.m.
- The employee claimed that he was routinely required to work outside of these hours, taking calls on his drive home and after 9:00 p.m.
- The employee produced phone call records to confirm his claim
- The employer did not have any records to dispute the employee's claim
- In review, the Board accepted that the employee had worked additional unpaid hours and awarded the employee unpaid wages, unpaid overtime pay, unpaid holiday pay, and unpaid vacation pay

2)A) Caselaw: Terminations: Fixed-Term Agreements

Wirta Home Care Ltd. o/a Home Instead Senior Care v Patrick Bennett

- This decision confirms the importance of being mindful of wage entitlements if an employee is required to answer calls or respond to emails outside of their normal working hours
- The decision also confirm that unpaid hours also trigger potential unpaid overtime pay, unpaid holiday pay, and unpaid vacation pay
- To limit or address this potential liability, for employees exempt from most wage entitlements under the ESA, employers should confirm in the employment agreement and in the HR Handbook that their salary covers all hours
- For employees not exempt from most wage entitlements under the ESA, employers should ensure that they properly limit, monitor, and address additional hours of work

2)B) Caselaw: Workplace Searches

York Region District School Board v. Elementary Teachers' Federation of Ontario

- In the matter of *York Region District School Board v. Elementary Teachers' Federation of Ontario*, the Supreme Court of Canada considered whether an employer can record an employee's private communications regarding the workplace, on a laptop owned by the employer
- The case involved two teachers who were communicating about a school issue via a password protected cloud based chat
- The principal who was aware of the chat, entered one of the teachers classrooms, woke her laptop, saw the chat on the screen, and scrolled through taking screenshots
- The teacher was then disciplined as a result of the contents of the chat
- The discipline was challenged on the basis that the school had violated the teacher's right to privacy at work

2)B) Caselaw: Workplace Searches

York Region District School Board v. Elementary Teachers' Federation of Ontario

- The arbitrator held that no Charter issues were triggered as an employee does not have the right under the Charter to be secure against unreasonable search or seizure in a workplace environment, unlike in a criminal context
- On appeal, the Court of Appeal confirmed the arbitrator's decision
- On further appeal, the Supreme Court of Canada held that while the Charter may not apply to most workplaces, the Ontario school boards are subject to the Charter as public education is a government function
- For employers subject to the Charter, they must be mindful of the employee's reasonable expectation of privacy
- The takeaway for all employers is to confirm that there should be no expectation of privacy in regard to their use of the company's IT Systems or IT equipment

2)C) Caselaw: Terminations: Psychological Injury

Krmptoic v. Thunder Bay Electronics Ltd.

- In the matter of *Krmpotic v. Thunder Bay Electronics Limited*, an employee with 30 years of service was dismissed just hours after his return to work from back surgery
- The employee was informed that the reason for his dismissal was the employer's financial issues
- At trial the employee was awarded 24 months' compensation
- The judge also awarded the employee $50,000 as a result of the employer's breached of the duty of good faith by not being candid and honest about the reason for the termination
- The employer appealed the decision

2)C) Caselaw: Terminations: Psychological Injury

Krmptoic v. Thunder Bay Electronics Ltd.

- On appeal, the employer argued that the employee was not entitled to aggravated damages as there was no medical or psychological evidence of mental distress
- The Court of Appeal held that an employee is not required to demonstrate that he had suffered a medical condition as a result of the employer's conduct
- Instead, If the employer breached its duty of honesty, then employee could be awarded aggravated damages if the breach cause them to suffer harm beyond what would normally occur
- Further to this decision, employers should be careful in being honest with the reasons for the dismissal
- Of course, employers should also be mindful if the honest reason for the dismissal could expose them to other grounds of liability

2)D) Caselaw: Terminations: Enforceability Based on the Parties Intention

Egan v. Harbour Air Seaplanes LLP

- If an employment relationship is not working, leaving aside *Human Rights Code* and reprisal considerations, the employee may be dismissed
- When an employee is dismissed, generally the employee will be entitled to their minimum statutory termination entitlements and reasonable notice at common law (judge-based law)
- There are three exceptions to this:
  1. where the company is dismissing the employee for cause and for wilful misconduct
  2. where there is frustration
  3. where the company has properly limited the employee's termination entitlements by way of an enforceable employment agreement

2)D) Caselaw: Terminations: Enforceability Based on the Parties Intention

Egan v. Harbour Air Seaplanes LLP

- With an enforceable termination provision, an employee can be limited to their minimum *Employment Standards Act* entitlements or a greater amount
- Without such a provision, when dismissed, an employee will be entitled to both their statutory termination entitlements and their common law termination entitlements
- With a proper termination provision in an enforceable employment agreement, an employee's termination entitlements could be reduced from 24 months' compensation to only 2 months' compensation

2)D) Caselaw: Terminations: Enforceability Based on the Parties Intention

Egan v. Harbour Air Seaplanes LLP

- The enforceability of a limiting termination provision in an employment agreement is the most commonly litigated issue in employment law
- This year, there have been a few positive decisions on this front for employers
- The first is the decision of *Egan v. Harbour Air Seaplanes LLP*
- In that case, the termination provision contained the following language, which confirmed that the employer could dismiss the employee with only his statutory entitlements:
  - "[t]he Harbour Air group may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the *Canada Labour Code*."
- The employee sued for his common law termination entitlements and the employer brought a motion to dismiss the action on the basis that the agreement limited the employee to his statutory entitlements
- The motion was successful and the Court dismissed the action
- The employee appealed the decision to the British Columbia Court of Appeal

2)D) Caselaw: Terminations: Enforceability Based on the Parties Intention

Egan v. Harbour Air Seaplanes LLP

- The British Columbia Court of Appeal took a different approach in reviewing the agreement, than is normally taken by the Courts in Ontario
- The British Columbia Court of Appeal focused on the intentions of the parties
- In consideration of the parties' intentions, the British Columbia Court of Appeal held that the termination provision was enforceable and unambiguous
- While this decision is a positive one for employers, it is still the best course of action to ensure the termination provisions contains proper limiting language

2)E) Caselaw: Terminations: Enforceability Based on Proper Language

Bertsch v. Datastealth Inc.

- In the matter of *Bertsch v. Datastealth Inc.,* the termination provision contained the following language:
  - 5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,…including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.
  - You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.
  - 11. (a) If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owning under the [ESA] …you shall instead receive your minimum entitlements under the [ESA]…
  - (h) This Agreement constitutes the complete understanding between you and the Company with respect to your employment, and no statement, representation, warranty or covenant have been made by you or the Company with respect to this Agreement except as expressly set forth herein. The parties have expressly contemplated whether there are any additional implied duties owed by the Company to you, at common law or otherwise, outside the written terms of the Agreement or under statute and confirm that there are no such obligations. This Agreement shall not be altered, modified, amended or terminated unless evidenced in writing by the Company.
  - (k) […] The invalidity, for any reason, of any term of this Agreement shall not in any manner invalidate or cause the invalidation of any other term thereof…
- The employee sued for his common law termination entitlements and the employer brought a motion to dismiss the action on the basis that the agreement limited the employee to his statutory entitlements
- The motion was successful and the Court has dismissed the action

2)E) Caselaw: Terminations: Enforceability Based on Proper Language

Bertsch v. Datastealth Inc.

- This termination provision contains exactly what the Courts have held a termination provision should contain if an employer wishes to limit an employee's statutory entitlements:
  - ✓ "… terminated with or without cause, you will be provided with…"
  - ✓ "… only the minimum…"
  - ✓ "… payments and entitlements…"
  - ✓ "… compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement…"
  - ✓ "… could be, less than your minimum entitlements owning under the [ESA] …you shall instead receive your minimum entitlements…"

2)F) Caselaw: Terminations: Fixed-Term Agreements

Copy v. Losani Homes

- In other webinars we have discussed the risk to employers when fixed-term employment agreements are used.
- In particular, if not drafted properly, an employer in the event of a without cause termination, can be required to pay out the terminated employee for the balance of the fixed-term
- Moreover, the duty of mitigation will not apply.
- This has happened again in the recent Ontario decision of ***Kopyl v Losani Homes***

2)F) Caselaw: Terminations: Fixed-Term Agreements

Copy v. Losani Homes

- In this case, the employer terminated the plaintiff on a without cause basis prior to the end of the fixed-term and attempted to rely on a termination provision in the agreement which limited the employee to the ESA minimum if their employment was terminated prior to the end of the fixed- term
- As is becoming more and more common, the court held that the termination provision was not enforceable
- As a result, the Court also held that the employer was obligated to pay the employee out through the balance of the one year fixed term.

2)F) Caselaw: Terminations: Fixed-Term Agreements

Copy v. Losani Homes

- The employer tried to rely on ***Waksdale v Swegon North America Inc.*** to argue that if one termination clause in an employment agreement breaches the ESA, then all the termination clauses in the agreement are automatically voided
- As such, the employer argued that this should no longer be considered a one year fixed-term Agreement, but rather indefinite term employment
- If this was the case then, the terminated employee would only be entitled to reasonable notice at common law
- This would have been significantly less than the length of the balance of the one-year fixed-term

2)F) Caselaw: Terminations: Fixed-Term Agreements

Copy v. Losani Homes

- Not surprisingly, the court did not agree, holding that a clause in an employment agreement that provides for a fixed-term of employment is not a termination clause
- This decision highlights both the risks of using fixed-term employment agreements and the need to carefully draft termination provisions

2)G) Caselaw: Independent Medical Examinations

Marshall v. Mercantile

- In ***Marshall v. Mercantile Exchange Corporation*** an employee with 25 years tenure was terminated on a without cause basis
- As no negotiated settlement was reached, the terminated employee brought a wrongful dismissal action, claiming 26 months' pay in lieu of notice of termination
- In the first nine months following the termination, the plaintiff took no steps to find new employment and claimed he would be unable to do so for the entirety of the 26 months period, as a mental health condition prevented him from mitigating his damages
- The former employer brought a Motion seeking an order to require the plaintiff to undergo an Independent Medical Examination

2)G) Caselaw: Independent Medical Examinations

Marshall v. Mercantile

- Relying on section 105 (2) of the *Courts of Justice Act*, the Court ordered the plaintiff to undergo an Independent Medical Examination if it was the plaintiff's position he remained medically unable to work after 12 months from his termination of employment
- The Court went 12 months given the previous decision of ***Brito v Canac Kitchens***
- In ***Brito***, the Court in reviewing the current case law, concluded that the longest period of time in which mitigation was not required because of a mental health condition was 12 months

2)H) Caselaw: Non-Competition Agreements

EF Institute v. WorldStride

- In ***EF Institute for Cultural Exchange Limited v WorldStrides Canada Inc.*** the Ontario Court of Appeal held that a terminated employee had not breached his fiduciary duty to a former employer or the terms of a severance settlement agreement with the former employer when he met with a future employer during the one year confidentiality and non-competition period post-termination.
- In this case, the Plaintiff had been employed as President of the EF Institute until his employment was terminated on a without cause basis
- A negotiated settlement was reached and, as a term of the settlement, the former President agreed to a confidentiality clause and to a one-year non-competition covenant
- The former President commenced employment with a direct competitor of EF one day after the non-competition covenant expired

2)H) Caselaw: Non-Competition Agreements

EF Institute v. WorldStride

- EF brought a claim for damages against the former President and his new employer, alleging that by meeting with the competitor during the restrictive covenant period the former President had breached both his fiduciary duties and also the terms of the settlement agreement
- It was also alleged that he provided confidential information to the competitor
- The Motions Judge dismissed EF's Claim and EF then appealed to the Ontario Court of Appeal
- the Court of Appeal dismissed the appeal holding it was not a violation of the covenant to meet with a competitor during the one-year non-competition period. It also so found that there was no evidence that the former president provided confidential information to the competitor
- This is an example of another decision which serves to limit the control that an employer can exert over a former employee post-termination

2)I) Caselaw: OHSA Penalties

R v. Eastway Tank, Pump & Meter Limited

- In April 2024, in ***R v. Eastway Tank, Pump & Meter Limited*** the Court imposed on Eastway the highest fine ever issued under OHSA for a small or even a mid-sized company
- In January 2022 there was an explosion at an Eastway facility in Ottawa that killed six workers and severely and injured a seventh
- Fines were imposed in the amount of $850,000 for Eastway and $80,000 for a company Director (plus the additional 25% victim impact surcharge)
- In delivering his decision Justice Hoffman describe the penalties as “precedent-setting fines that send a clear message to the business community, to other commercial enterprises about the need to prioritize worker safety.”
- This decision highlights the fact, that as a matter of policy, fines for OHSA prosecutions have been significantly increasing and will continue to do so
- This decision also reinforces the need for employers to ensure OSHA compliance

2)J) Caselaw: Owner Responsibility under OSHA

R v Greater Sudbury

- ***R v Greater Sudbury (City)***, the risks to Owners if they become involved in a construction Project, even on a very limited basis, has been highlighted
- In this case, Greater Sudbury put a construction project for road and water main repairs out to tender
- It ultimately contracted with a General Contractor who agreed to serve as the Constructor for the Project
- The General Contractor also agreed to assume full responsibility to ensure that it, and all sub-trades, acted in full compliance with OSHA
- A fatal accident happened at the worksite and the City was charged both as a Constructor and as an Employer

2)J) Caselaw: Owner Responsibility under OSHA

R v Greater Sudbury

- The charges against the City as a Constructor were dismissed
- The Supreme Court of Canada, however, ultimately held that the charges against the City as an Employer could proceed
- In so doing the court relied on the fact that the City occasionally sent its quality control inspector employees to the job site to check for defects the in workmanship on the Project
- The quality control inspectors, however, could not direct or control any of the work performed by the General Contractor or by any of the sub trades.

2)J) Caselaw: Owner Responsibility under OSHA

R v Greater Sudbury

- Notwithstanding this, the occasional presence on site of City employees was enough for both the Ontario Court of Appeal and the Supreme Court to hold that the charges against the City as an Employer could proceed
- This demonstrates that if an owner maintains even limited contact on the project, even in matters not relating directly to the construction itself, it can be liable as an employer under OHSA
- This decision stresses the need for Owners to hand over the full control of a Project to a General Contractor if it wishes to avoid OHSA liability

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

Dan Condon
905.940.5505
dcondon@wvllp.ca

Christine Ashton
905.940.0526
cashton@wvllp.ca

Wilson Vukelich LLP
Lawyers