Ontario Employer Compliance
Helping employers in Ontario for 30 years

Monday February 22nd 2021
Covid-19 In the Workplace
Plus – Employment Contracts (by ***Goulart Workplace Lawyers***)

www.ontarioemployer.com (416) 845-7547 rossparise@outlook.com

Ontario Employer Compliance is excited to provide you with our first Newsletter intended to help employers better understand their obligations as they relate to employment standards and the rapidly changing landscape of employment law.

Covid-19 In the Workplace

Do I have to send all my staff to work from home?

This question applies to employees who are not in retail, production, industrial or work that can't be performed remotely, but more addresses your sales, accounting, office and administration staff. If you are in a position to provide a staff member with the means to work safely from home, then YES you are obligated to follow through. But it is also important to make perfectly clear that the means to do so must be in a manner that supports the ability to remain productive and tend to their duties remotely without causing undue financial hardship to your business.

Circumstances such as lack of internet connections at home or lack of computer hardware which the business cannot afford to purchase for the employee at this time are acceptable impositions for requesting that the staff member continue to report to work at the office. As is the occasional requirement to accept customer payments in person *(subject to the Covid-19 Visitor Policy – comments below).*

It is worth explaining that financial hardship – if challenged - is proven by way of providing reporting details that demonstrate the negative financial impact the action would have on the business. So be cautious throwing around that statement unless you can genuinely back it up. I recommend a discussion with your professional accountant do determine your ability to use hardship as an argument.

Can the staff member refuse to work from the office?

Any employee has the right to refuse unsafe work. Normally, the term "unsafe" may commonly refer to work conditions in a factory or around machines. However, under the current circumstances, unsafe work can also refer to an employee's concern that their employer is not safeguarding the workplace against the risk of Covid-19 infection.

Employers in Ontario are obligated to have a Covid-19 plan in place. Such a plan must identify the steps being taken to protect your workers and maintain a safe environment. The plan must also include a method for recording and tracking those steps so that the ongoing maintenance of the plan can be observed and managed. Furthermore, the plan must be presented to the employees and they must be able to refer to it at any time should they have questions or concerns.

If your facility has a Joint Health & Safety Committee, I recommend that the committee members be trained on the plan and have the ability to interact directly with any concerned worker in order to address any concerns. At the very least your business should already have a health & Safety Representative and you can arm them with the same autonomy.

What should the Covid-19 Plan involve?

Your plan should include requirements for the use of PPE (Personal Protective Equipment) within the workplace such as masks, gloves, hand sanitizer and disinfecting cleaning products. Your plan should also include a description of the internal cleaning policies such as how and when surfaces, handles and other areas are being cleaned and by whom.

Critical items such as personal distancing also need to be addressed. This can be challenging in some workplace environments, so every business should be addressing the space between workers as best as they can. The plan should also then involve the alternative methods of protection where space is limited. The includes the mandatory use of masks indoors as well as maybe staggering break times and adding additional meal break areas.

What if we have a Covid-19 Plan and the staff member still refuses to come to work?

Fear and misunderstanding are an unfortunate and regular occurrence under the current pandemic circumstances. Although I cannot provide a "one size fits all" solution to this challenge, I do strongly recommend that full and clear communication between the employer and concerned employee be exhausted before any further actions are considered.

There are some situations where an employee can be deemed to have abandoned their employment by way of refusing to attend work. However, such circumstances need to be carefully reviewed for clarification.

If you feel that you are wholly compliant with your requirements to have a Covid-19 Plan in place but an employee still refuses to attend work, then I suggest calling me to discuss the matter further.

Does a Covid-19 illness in my workplace need to be reported to WSIB?

Yes, it does. This widely unknown fact falls within the Workplace Safety & Insurance Act itself, in so far that Covid-19 is an illness and if it is contracted (or even if you suspect it was contracted) within your workplace, then it must be reported to WSIB. Reporting an illness is no different than reporting an injury with both the employer and employee statements required. The positive test result confirming a Covid-19 infection can replace the physician's statement in reporting. The assigned case manager will determine of benefits will be funded through WSIB or through another means currently available during the pandemic.

What about visitors to my facility?

Your Covid-1o plan should include a visitor policy. Since we are under a province wide lockdown at the time I am writing this newsletter, it is easy to explain that your business must be closed to outside visitors at all times. Make sure that your doors remain locked and/or that clear and conspicuous signs are posted to all those who would try to enter your facility. The signs should identify the need to stop, phone the facility and explain the purpose of the visit and then await further instructions from inside.

If the visit is an essential aspect to your business, then the visitor should be presented with your Covid-19 safety plan and they must be instructed to maintain a distance of no less than 6 feet from all workers and wear their mask at all times. You should have the means of taking the temperature of all outside visitors before they gain access to your facility and access to those who have either a low grade or greater fever should be immediately denied.

How to manage an outbreak of Covid-19 in the workplace.

There is enough information to share on this topic that would require an entirely separate newsletter. Perhaps, my next offering will be dedicated to that topic. However, in order to be able to shed some light on this occurrence, I provide the following in point form;

- (If not hospitalized) The infected worker is to stay home for at least a two-week period and must provide a negative test result before being cleared to return to work. This period may be extended depending on the severity of symptoms and the effects of the illness itself.
- All co-workers and other staff members who may have been in close contact with the infected worker must be notified without delay and be sent home for voluntary self-isolation for two weeks. Although each municipal office of public health has a slightly different requirement, common sense suggests that those same workers go for testing within four days of the potential exposure. (Close contact is anyone who would have been within 6 feet of the infected worker for a period of at least 10 to 15 minutes or may have been in regular contact with the same surfaces as the infected worker)
- You should immediately start a log of all those people who were in close contact and have it ready in case you are asked for it by your municipal office of public health.
- The area or office and any other common areas that the infected worker would have routinely been located at within your workplace should be closed to further traffic and then professionally disinfected before access is granted again. If you are uncertain where that is or you feel it could have been anywhere in your facility, then close the entire workplace down until the cleaning has been completed.

A special contribution from; Goulart Workplace Lawyers

Legal Insight: The Need to Update Your Employment Contracts

GOULART

Goulart Workplace Lawyers
2295 Bristol Circle, Suite 203
Oakville, ON, L6H 6P8
(289) 856-1101 rgoulart@goulartlawyers.ca

It's official. The Court of Appeal's decision in Waksdale v. Swegon North America Inc., 2020 ONCA 391 will not be heard by the Supreme Court of Canada. The case remains the leading authority for interpreting termination provisions in employment agreements in Ontario.

Let's start with the concept confirmed by the Court of Appeal in this case: termination provisions must be interpreted organically, as one entire working element. If one part of the clause violates the law, the whole clause is in jeopardy and no "severability" provision will save it.

Termination clauses have three main parts: resignation, termination without cause, and termination for cause (after probationary period). The key element in this case was the "just cause" provision. Most agreements say that in the event of just cause, an employer may terminate without notice or pay in lieu of notice – the employee is paid nothing except whatever is owing to the date of notice, including accrued vacation pay.

But here's the problem identified by the Court: the only way to deprive an employee of notice or pay in lieu of notice under the Ontario Employment Standards Act, 2000 (the Act) is for "wilful misconduct, neglect, and disobedience". This is a higher standard, so the traditional "just cause" provision has the potential to violate the Act, with the fundamental finding that just cause and wilful misconduct are not the same thing. The entire provision may therefore be in violation of the Act, and the employer is left with an unenforceable clause, with termination subject to common law notice or payment in lieu of notice.

This is especially problematic if the agreement provides for the payment of only statutory minimum termination amounts under the Act. For now, this appears to be a problem only for Ontario employers.

How do employers fix this? It is not easy for existing employees who have already signed agreements with the more traditional just cause language. Here are a few suggestions:

1. If the employer is terminating an employee who is subject to a problematic clause, consider offering a package that is more than the amount prescribed - but ask for a release. This is especially important if the contract provides for only statutory minimum notice and severance in the event of termination without cause. The extra amount should have regard to common law notice, especially if it is determined that the existing termination provision is truly problematic.

2. The existing agreement template should be reviewed and updated. While at it, carefully review the bonus provisions, given more changes outlined by the Supreme Court of Canada late last year on the topic of bonuses payable over the notice period (different topic, I know). Finalize the template and use it for all new hires as soon as possible.

3. For existing employees who have already signed a problematic agreement, the key question is whether to have them sign a new and improved one. There is no right or wrong answer, as having existing employees sign new agreements is fraught with risk, as outlined below. However, under certain circumstances, a new agreement should be introduced.

4. Consideration is key for existing employees to sign a new employment agreement. In order to be binding, every employment agreement needs consideration – the bargain that flows between the parties in order to support the obligations in the agreement. This is the challenge with having existing employees sign an agreement mid-employment – they already work for the company. It is easy with new employees, as the bargain is the job itself as long as the agreement is signed before the new employee starts. But what do new employees get as consideration? In such a case, classic consideration would include a promotion, or changes to compensation which are not in the ordinary course. For example, the introduction of a new commission or bonus plan. This means that an employer may just have to wait for the opportunity to have new agreements signed, and implement the new form on a gradual basis.

What if the employer wishes to have a new contract signed as soon as possible? This is the hardest question of all. Typically, our advice is to provide a signing bonus in such cases, in an amount that recognizes what the employee is being asked to give up. It is very difficult to generalize as to what the amount should be, as it is always specific to the circumstances (and the terms of the particular agreement being replaced).