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Looking Ahead: Employment Law Issues on the Horizon in 2021

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2020 was an unprecedented year for Canadian employers. The onset of the global COVID-19 pandemic forced employers to deal with a barrage of health & safety and economic challenges, not to mention a constantly changing legal environment (often daily). The ongoing distribution of COVID-19 vaccines provides hope that 2021 will be a less disruptive year for Canadian employers, but numerous challenges remain.

Here are a number of key employment issues for Canadian employers to keep their eyes on in the year ahead.

Work-From-Home Arrangements

While the COVID-19 pandemic and the resulting public health orders and regulations have required many employers to implement work-from-home (WFH) arrangements at least on a temporary basis, these arrangements will pose a number of challenges in the medium and long term.

As the threat of COVID-19 recedes, many employers may welcome the opportunity to return to their traditional in-office work arrangements as soon as possible. But having set this precedent, we anticipate WFH arrangements will remain a more common feature of Canadian workplaces (and may be requested/expected by employees). Employers intending to return to exclusive in-office arrangements will face the issue of what to do with employees who object to returning and want to preserve their WFH arrangement. When assessing these requests, employers will need to keep in mind potential human rights accommodation obligations, including family status-related circumstances such as child- or eldercare obligations, all of which may be engaged particularly throughout 2021 while the risks of COVID-19 will only decrease gradually.

For employers who intend to take this opportunity to implement more permanent WFH arrangements (i.e., for potential cost savings), this raises its own set of issues, including how to manage and communicate with the workforce effectively, tracking productivity and employee performance, maintaining confidentiality/security over company property and information, and addressing ergonomic/health and safety impacts (which remains an employer responsibility even in the context of WFH arrangements). Further, as employers were forced to implement WFH arrangements in 2020 without warning, many do not have

policies and procedures in place that set clear expectations for employees or permit them to manage these issues on a more permanent basis. Accordingly, establishing long-term WFH arrangement policies and procedures will be an important goal for many employers in 2021.

Managing Vaccines/Outbreaks in the Workplace

Of course, we are not out of the woods yet, and COVID-19 will continue to pose a significant health risk for the majority of Canadians not estimated to be vaccinated until the latter half of 2021. Managing outbreaks in the workplace in the interim will continue to be a real challenge for Canadian employers as COVID-19 restrictions lessen.

And as COVID-19 vaccines become readily available, new issues will arise: how to manage vaccines in the workplace? Will vaccinated employees be treated differently than non-vaccinated employees? What questions can employers ask employees or evidence of vaccination can they require without contravening human rights and privacy laws? What to do with employees who refuse to be vaccinated despite having the option to do so?

The availability of vaccines will create additional complications and add to the existing challenges Canadian employers face with respect to employees who object to following even lesser COVID-19 safety measures, such as the use of masks in the workplace.

How will Waksdale be Applied?

To the dismay of many Canadian employers, on January 14, 2021, the Supreme Court of Canada denied leave to appeal of the Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc*. 2020 ONCA 391, in which the Court of Appeal held that a "without cause" termination provision was unenforceable as a result of the fact that the "just cause" termination provision in the employment contract contravened Ontario's *Employment Standards Act, 2000* (despite the fact that the employee was terminated on a without case basis and the "just cause" termination provision was not relied upon). Our summary of the Court of Appeal's decision is located here.

As the Supreme Court of Canada has declined to take this opportunity to clarify the law regarding termination provisions, and in particular, how the (un)enforceability of "just cause" termination provisions impact the enforceability of "without cause" termination provisions in employment agreements, the question of how the lower courts will apply *Waksdale* will take on greater significance, especially for employers in Ontario, Nova Scotia, and Newfoundland and Labrador which share similar language in their respective employment standards legislation. Of particular interest will be how courts in these provinces assess whether or not the language of specific "just cause" termination provisions do in fact contravene the

applicable minimum standards legislation (which was not at issue in *Waksdale* since this was admitted by the employer).

At a minimum, we can expect greater attention to be paid going forward to the language used in “just cause” termination provisions, even where a termination is conducted on a “without cause” basis. To the extent employers have not already done so, reviewing and updating their termination provisions in light of *Waksdale* should be on the agenda for 2021.

Temporary Layoffs and Constructive Dismissal

Prior to 2020, temporary layoffs were uncommon for most employers in Canada given the risk of constructive dismissal claims unless such layoffs were expressly permitted under an employment agreement or as part of a normal industry practice (a primer on constructive dismissal claims can be found here).

However, all this changed in 2020: temporary layoffs (or COVID-19 related leaves of absence) became commonplace out of necessity due to shutdowns of significant portions of the economy even where employers did not have this express right. While many employees may have accepted temporary layoffs instead of asserting that they had been constructively dismissed in recognition of these exceptional circumstances and out of a desire to keep their jobs in uncertain times, the risk of constructive dismissal claims remain.

Further, while government programs/benefits at both the federal level (such as the Canada Emergency Wage Subsidy (CEWS), the Canada Emergency Response Benefit (CERB), and, most recently, the Canada Recovery Benefit (CRB)) and at the provincial level (such as Ontario’s Infectious Disease Emergency Leave discussed further here) provided assistance to many employers/employees throughout 2020 and may have forestalled such claims for the time being, the eventual end of these programs/benefits will no doubt bring with them an increase in employee litigation.

Even in Ontario, where many employees who were initially put on a temporary layoff have since been deemed to be on “infectious disease emergency leave” pursuant to provincial regulation and expressly not considered to be constructively dismissed, the question becomes what happens to these employees on July 3, 2021 when their “infectious disease emergency leave” expires in accordance with the current regulation? Ontario employers who are unable to recall employees at that time will face the prospect of having to formally terminate employees or place them on new temporary layoffs despite the accompanying risks of doing so.

Gig Workers and the Employee vs. Independent Contractor Debate

Finally, the “gig” economy and the related increasing use of self-employed workers/independent contractors as opposed to employees looks set to continue in 2021. Indeed, the prevalence of work-from-home arrangements (with less employer control) may increase this trend and make the distinction between employees and independent contractors even murkier. In 2020, we saw the release of the Supreme Court of Canada’s decision in *Uber Technologies Inc. v. Heller*, which held that Uber’s arbitration clause was unenforceable and therefore paved the way for a proposed class action to proceed in Ontario courts to determine whether Uber drivers should properly be considered employees (a discussion of the decision can be found here). While the eventual outcome of the proposed class action is a long way off, we anticipate similar claims that workers in these types of non-traditional roles should properly be considered employees to become more commonplace in the future.

As always, the Cassels Employment Law Group remains available to help clients navigate these challenging issues in the year ahead.
