

2022: The Year in Review in Employment Law

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2022 was a year of change. The world emerged from the COVID-19 pandemic and ushered in a new landscape for workplaces and employment law in Canada. For the first time, many employers grappled with recalling some or all of their workforce to the office, building flexible hybrid work environments that meet the needs of employers and employees alike, and maintaining a safe and healthy workplace. As hybrid work and remote workers become the new normal for many industries, complex and novel legal issues arise for employers, including cyber security risks and data protection, immigration and tax matters, and employee monitoring.

The Ontario government introduced a number of legislative changes that came into effect in 2022 that reflect the new reality of remote work. For example, all Ontario employers with 25 or more employees must now have a written policy on disconnecting from work and electronic monitoring of employees.

Canadian courts have also weighed in on a myriad of pandemic-related issues in 2022, such as employees failing to comply with vaccination or masking policies and constructive dismissal in the wake of infectious disease emergency leave legislation. We have also seen our courts tackle traditional employment issues this year regarding entitlements during the common law notice period, restrictive covenants, and the distinction between just cause at common law and wilful misconduct under the Ontario *Employment Standards Act, 2000*. (Please see our previous articles below for the most significant decisions and legislative changes in 2022.)

As we look ahead to 2023, employers can expect more guidance from the courts concerning remote work issues and COVID-19-related layoffs. We may finally get definitive clarification regarding whether the common law right to claim constructive dismissal has been displaced by the Infectious Diseases Emergency Leave in Ontario.

Privacy issues may become contentious and litigious now that employers must disclose electronic monitoring of employees, at least in Ontario. Privacy legislation regarding electronic employee monitoring is a patchwork across Canada. As a result, we anticipate a wide-ranging response from Canadian courts on this issue.

We expect equity and accessibility issues will also be a major trend in employment law throughout 2023 and beyond. Under the *Accessible Canada Act*, federally regulated employers with 100 or more employees must have an accessibility plan in place by June 1, 2023. Small federally regulated businesses (10 to 99 employees) have until June 1, 2024. Canada's *Pay Equity Act* is also now in force and requires federally

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regulated employers with 100 or more employees (or 10 to 99 unionized employees) to develop a pay equity plan by August 31, 2024.

Disputes regarding whether an employee can be forced to return to work after working remotely for over two years may also result in litigation, with many employees taking the view that they should be able to choose to work remotely even when employers are directing them to return to the physical workplace. Employers should also be prepared to address equity, accommodation, and discrimination issues that can arise in a hybrid work environment.

Finally, as many employers have come to expect, termination clauses will likely continue to be the subject of judicial scrutiny. For example, a recent Ontario decision¹ found that a termination clause was unenforceable, this time, due to a reference to termination without notice for breach of a “conflict of interest” provision in the employment agreement. As a result, it is a good time to review and update your employment contracts, if you have not done so in the past year.

Related Articles of Interest

- Terminated Employee Receives 26 Years of LTD Benefits from Former Employer
- Ontario Court of Appeal Weighs in on the Meaning of "Wilful Misconduct"
- Bill 88, *Working for Workers Act, 2022*: Ontario Introducing More Changes for Employers
- Bill 27 Update: Disconnecting from Work Policy Requirements
- Class Action for Unpaid Vacation Pay Beyond Two-Year Limitation Period May Proceed
- BC Supreme Court: Placing Employee on Unpaid Leave for Failure to Comply with Mandatory Vaccination Policy Was Not Constructive Dismissal
- Ontario Court of Appeal Finds Non-Competitive Clause in Employment Agreement to be Unenforceable
- Unpaid Leave for Refusal to Adhere to Masking Policy Does Not Constitute Constructive Dismissal
- Effects of IDEL on the Common Law Doctrine of Constructive Dismissal Uncertain

For more information on any of these topics, or any employment law-related matters, please contact any member of our Employment & Labour Group.

¹ *Henderson v. Slavkin et al.*, 2022 ONSC 2964.