BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

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Changes to Canada Labour Code: Increase to Notice Period for Individual Terminations Coming February 1, 2024

The Federal Government has recently announced amendments to the *Canada Labour Code* (the "*Code*"). As of February 1, 2024, the *Code* will provide greater notice of termination periods for employees based on their length of employment.

Under the current *Code*, federally regulated employees are entitled to two (2) weeks' notice of termination, pay in lieu of notice, or some combination of the two, except where the termination is by way of dismissal for just cause.

The amendments will revise section 230 of the *Code*. The new provisions under the *Code* will implement a graduated notice system similar to the structure found in most provincial employment standards legislation. Terminations by way of dismissal for just cause will remain exempt from section 230 notice period entitlements.

For employees who have completed between three (3) months and up to three (3) years of continuous employment, the two-week notice period will remain unchanged. However, once an employee has completed three (3) years of continuous employment, the revised section 230 will entitle them to either prior written notice, wages in lieu of notice, or any combination of the two, in accordance with the following formula:

Continuous Service	Minimum Notice Period
3 months	2 weeks
3 years	3 weeks
4 years	4 weeks
5 years	5 weeks
6 years	6 weeks
7 years	7 weeks
8 years (or greater)	8 weeks

The severance pay provisions under section 235 of the *Code* will remain in effect for employees who have completed at least 12 consecutive months of continuous employment before their termination of employment. Employees eligible for severance pay under the *Code* will continue to be entitled to two (2) days' regular wages for each full year that an employee has worked prior to their termination of employment, with a minimum payment equal to five (5) days' wages; whichever is the greater benefit.

Statement of Benefits

As of February 1, 2024, employers will also be required to provide terminated employees with a statement of benefits. The statement of benefits, which is already required in a group termination context, is required to outline vacation benefits, wages, severance pay, and any other benefits and pay arising from their employment.

There are timing requirements employers will need to follow. Specifically, the *Code* requires that the statement of benefits must be provided no later than the date of termination for employees who receive pay in lieu of notice. If employees are provided with notice of termination, the statement of benefits must be delivered no later than two (2) weeks before the date of their termination. If the employee receives a combination of notice, and pay in lieu of notice, the statement of benefits must be delivered no later than two (2) weeks before the date of their termination.

Implications on Employers

Federally regulated employers should have an employment lawyer revise their agreements to ensure they provide the statutory minimum entitlements so their agreements remain enforceable after the *Code* amendments take effect.

Canada Labour Code to Ensure Access to Menstrual Products at work Starting December 15, 2023

The Federal Government of Canada announced that as of December 15, 2023, all federally regulated workplaces are to begin offering menstrual products available to workers at no cost, for employees in the workplace.

The Minister of Labour, Seamus O'Regan, announced that the initiative is intended to improve the well-being of nearly half a million workers who may require menstrual products during their workdays, including cisgender women, non-binary individuals, transgender men, and intersex individuals. These changes are intended to address the number of systemic inequities, reduce stigma, and create healthier, more inclusive workplaces.

Section 9.17 of the *Canada Occupational Health and Safety Regulations,* will require federally regulated employers to provide menstrual products, including clean and hygienic tampons and menstrual pads, in each toilet room.

The regulations emphasize the importance of privacy of employees. Should it not be feasible to provide menstrual products in a toilet room, employers will be required to provide them in another location in the same workplace that offers a reasonable amount of privacy.

In addition to the products, employers are required to provide a covered container for the disposal of menstrual products in any toilet room that has only one toilet; and in each toilet compartment of any toilet room that has more than one toilet.

The Labour Program intends to provide guidance material to help employers comply with the Regulations and ensure clear interpretation prior to December 15, 2023.

Ontario Announces Occupational Illness Registry

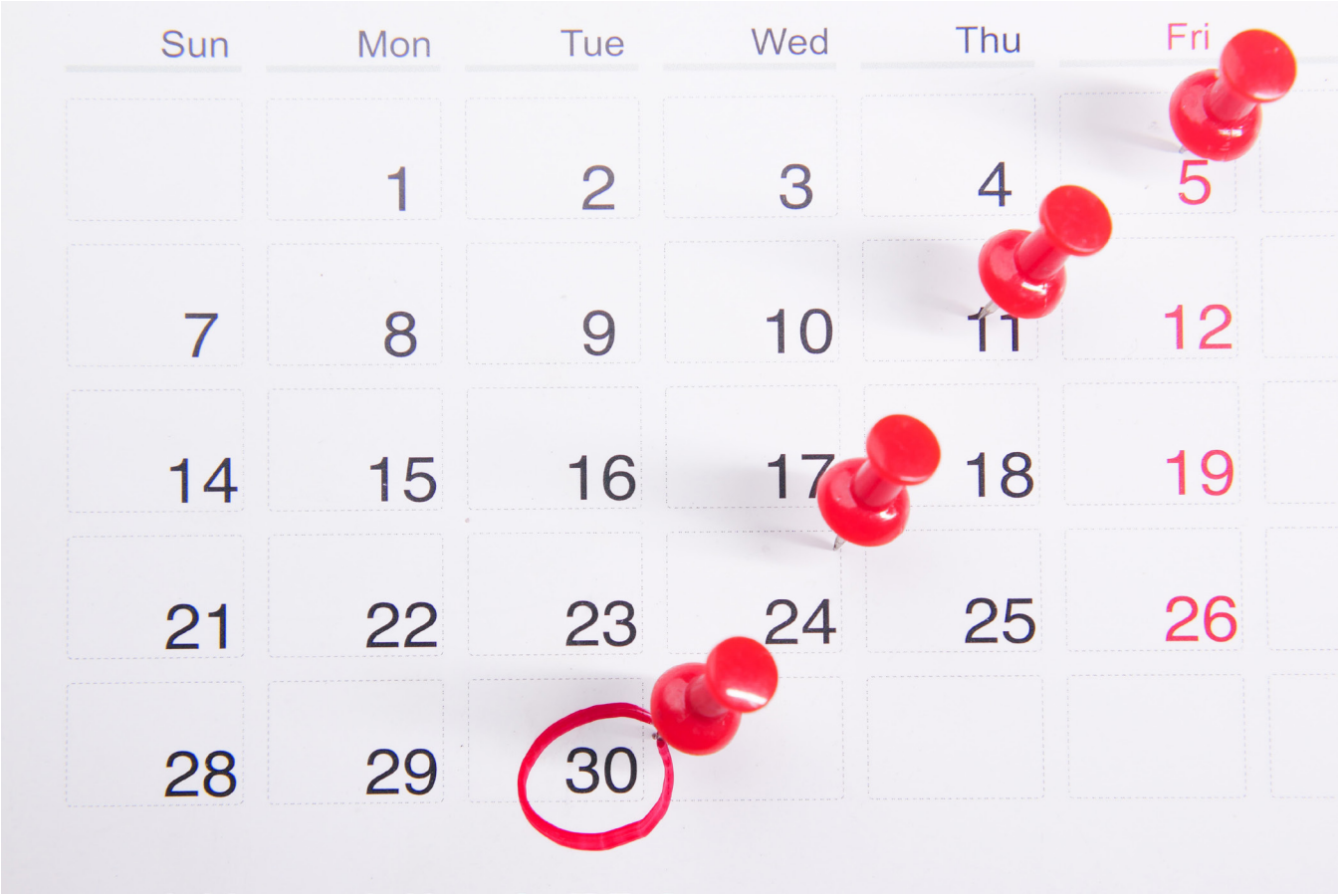
On October 10, 2023, the Ontario Government announced that it would be creating Canada's first-ever Occupational Exposure Registry to address many of the 41 recommendations set out in the province's recent report: the Occupational Disease Landscape Review.

The Registry, which is expected in 2025, intends to track occupational illness that results from workplace exposure to a physical, chemical or biological agent that could impair the health of workers.

In 2022 alone, the Ontario Workplace Safety and Insurance Board (WSIB) allowed approximately 40,000 occupational disease claims totalling $82.5 million. The Registry aims to reduce the number of claims by tracking harmful exposure levels, helping diagnose workplace diseases faster, and improving worker compensation, which in turn aims to reduce costs to the healthcare system.

Furthermore, the Registry will include comprehensive exposure records, identify at-risk workers, help with early diagnosis, and potentially contribute to expanding the list of presumptive illnesses in Ontario to improve worker compensation.

In addition to the Registry, Ontario has begun work on delivering some of the report's recommendations, including developing a web-based Silica Control Tool which aims to assist in detecting and monitoring workplace silica exposure in the construction and mining industries.



Ontario Court of Appeal Upholds 30 Months' Notice for Terminated Employee

In *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696, the Ontario Court of Appeal found that 30-month notice period was an appropriate award for wrongful dismissal.

The appellant, Avaya Canada Corporation ("Avaya"), terminated the employment of the respondent, John Lynch, a professional engineer due to a company restructuring. The respondent had worked for Avaya and the prior owner of the business for 38.5 years.

The motion judge found a 30-month notice period was appropriate in all circumstances. Avaya appealed the decision contending that the motion judge erred by wrongfully concluding that the circumstances in the matter placed it within the "exceptional circumstances" category of cases, which would justify a notice period in excess of 24 months.

The Court recognized that there is no absolute upper limit or "cap" on what constitutes reasonable notice, however, the Court confirmed that only exceptional circumstances will support a base notice that exceeds more than 24 months.

Although the motion judge did not provide reasons for concluding what factors constituted "exceptional circumstances", the Court of Appeal provided factors which would justify the award in excess of 24 months. The factors were as follows:

1. Mr. Lynch specialised in the design of software to control unique hardware manufactured by Avaya at its Belleville facility;
2. it was uncontested that Mr. Lynch's job was unique and specialized, and that his skills were tailored to and limited by his very specific workplace experience at Avaya;
3. during his lengthy employment of 38.5 years, Mr. Lynch developed one or two patents each year for his employer;
4. Avaya identified Mr. Lynch as a "key performer" in one of his last performance reviews; and
5. although similar and comparable employment would be available in cities such as Ottawa or Toronto, such jobs would be scarce in Belleville where Mr. Lynch – who was approaching his 64th birthday – had lived throughout his employment.

These are extremely unique factors that are unlikely to exist in most cases.

Avaya submitted Mr. Lynch took no reasonable steps to mitigate his damages by seeking other employment, and as such the notice period should be reduced. The Court of Appeal disagreed. The Court of Appeal deferred to the motion judge's acceptance of Mr. Lynch's evidence relating to his efforts to find employment and his reasons for not expanding his search.

The Court of Appeal dismissed the appeal.

Expanding Job Duties without Updating Contract may be Costly for Employers

In the recent Ontario Court of Appeal (ONCA) decision, *Celestini v. Shoplogix Inc.*, 2023 ONCA 131, ("*Shoplogix*") the Court confirmed that if an employer substantially changes or expands an employee's duties and responsibilities, the employer may no longer rely on the employee's written contract if the contract remains unchanged.

In coming to their decision, the ONCA relied on the substratum doctrine, which indicates that where there are too many changes to an employee's duties, an unchanged employee contract will have "disappeared or substantially eroded".

In *Shoplogix*, the employer dismissed Mr. Celestini without cause. The employer, Shoplogix, took the position that Mr. Celestini's rights were governed by his employment contract. The contract provided that the employee was entitled to 12 months' base salary, continued group health insurance and entitlement to a pro-rated annual bonus. The employer argued that Mr. Celestini's title never changed since starting employment with the company.

Mr. Celestini took the position that the termination provisions in the employment contract were unenforceable. Mr. Celestini argued that the substratum of the contract he signed 12 years prior had substantially eroded, due to the material changes to his duties since he signed his contract.

Shoplogix argued that the substratum doctrine did not apply because Mr. Celestini remained an executive or senior manager. Shoplogix contended that in order to trigger the substratum doctrine there needed to be both a fundamental expansion of Mr. Celestini's duties, and a promotion – which implies a change in title.

The Court did not accept this argument. The Court stated that the most important aspect of the doctrine was whether there were actual increases, of a fundamental nature, in the duties and the degrees of an employee's responsibility.

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Shoplogix also argued that over the 12 years, the changes to Mr. Celestini's duties and responsibilities were only incremental and not fundamental. Again, the Court disagreed. Relying on the motion judge's assessment, Mr. Celestini's duties and responsibilities "far exceeded any predictable or incremental changes to his role that reasonably would have been expected" when Mr. Celestini started his role in 2005.

In 2008, Shoplogix and Mr. Celestini entered into an Incentive Compensation Agreement (ICA), which provided management-level employees with a new bonus plan. The ICA was a result of restructuring which reduced the number of senior managers at Shoplogix. As a result of the restructuring, Mr. Celestini's workload responsibilities increased. Mr. Celestini's new tasks included managing sales and marketing and traveling to pursue international sales opportunities.

The Court concluded that these changes were enough to engage the substratum doctrine rendering the contract void. As such, Mr. Celestini was entitled to 18 months of common law reasonable notice, totalling his damages to $420,000, in addition to the damages he already received pursuant to the 2005 contract.

This decision is a reminder to employers that employment contracts signed at the start of an employment relationship could be rendered void by the end of the relationship. To avoid this risk, before employers hire, promote, provide a salary increase or substantially change an employee's duties, they should have an employment lawyer revise the contract to ensure that the new contract properly protects the employer from any future claims.