BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

Winter 2025

A Quarterly Newsletter on Labour and Employment Law Issues

In this Issue

Bird Richard
130 Albert Street, Suite 508
Ottawa, Ontario K1P 5G4
T 613.238.3772
F 613.238.5955
www.LawyersForEmployers.ca

Working For Workers Six Act

On December 19, 2024, Ontario's *Working for Workers Six Act, 2024* (Bill 229) received Royal Assent. Bill 229 aims to build on the progress of the previous five Working for Workers Acts. This legislation introduces a range of measures designed to protect workers' health and wellbeing, promote skilled trades, and reduce costs and add benefits for workers across the province.

New Parental and Medical Leaves – *Employment Standards Act, 2000 (ESA)*

- As of June 19, 2025, employees with at least 13 weeks of service will be entitled to an unpaid leave of up to 27 weeks if they are unable to perform the duties because of a serious medical condition. The duration of this leave is intended to align with the federal government's employment insurance (EI) 26-week sickness benefit.
- Employees with at least 13 weeks of service who become new parents through adoption or surrogacy will be entitled to unpaid leave of up to 16 weeks after the placement or arrival of a child into the employee's custody, care and control. This new leave is not yet in force and its effective date will be proclaimed in the future.

Repeat Offenders, Fitted PPE for All, and More – *Occupational Health and Safety Act (OHSA)*

The following amendments to the *OHSA* are now in force and aimed at growing Ontario's workforce by bringing more women into trades and increasing workplace safety.

- Corporations found guilty of a second or subsequent offence under the *OHSA* that results in the death or serious injury of one or more workers within a two-year period will face a minimum fine of $500,000.
- Employers are now required to ensure that personal protective clothing and equipment are properly fitted for women and all body types. Additionally, the government has the authority to impose further regulatory requirements related to the assessment of such protective gear.

- The Chief Prevention Officer has been granted the authority to establish criteria for assessing and approving training programs delivered outside of Ontario for equivalency, as well as to establish policies related to general training requirements under the *OHSA*. The officer may also seek advice from an advisory committee established by the Ministry of Labour, Immigration, Training and Skills Development, and collect and use personal information for developing, monitoring, or reporting on a provincial health and safety strategy, or providing advice on preventing workplace injuries and occupational diseases.
- The Minister of Labour, Immigration, Training and Skills Development now has the authority to require constructors to establish worker trades committees at projects and determine their composition, practices, and procedures.

Keeping Costs Down for Businesses – Workplace Safety and Insurance Board (WSIB)

The following WSIB initiatives are not enacted through Bill 229; however, it was included as part of the Bill's announcement.

- The Workplace Safety and Insurance Boad (WSIB) will be returning $2 billion in surplus funds to Ontario businesses. Eligible employers will receive their one-time rebate starting in February 2025 if they are a safe employer, which includes not having been convicted more than once under the *WSIA* or *OHSA* since 2020.
- The WSIB will also cut the average premium rate for Ontario businesses from $1.30 to $1.25 per $100 of insurable payroll through the WSIB starting in 2025, without reducing benefits. This is the lowest rate in half a century and will save Ontario businesses about $150 million annually starting in 2025 when compared to the 2024 rate.

Ontario Immigration Act, 2015

Ontario Immigration Act amendments now in force provide that a person or body shall not make misrepresentations, or counsel the making of misrepresentations, that falsely allege that an applicant meets any prescribed criteria for approval.

Failure to comply with the section is an offence. The minister may ban offending actors from submitting applications for a period of up to five years, and permanently ban the person or body from acting as recruiters for up to five years in cases of conviction for a prescribed offence, or for a period of three to ten years in other cases.

These measures will apply when the minister has reasonable grounds to believe that the person or organization has violated the Act or its regulations.

Photo by engin akyurt on Unsplash

Ontario Expanding the Role of Nurse Practitioners and Registered Nurses

The Ontario government is introducing changes to improve access to healthcare by expanding the scope of practice for nurse practitioners and registered nurses. These regulatory adjustments will enable them to order more tests and provide additional services across various healthcare settings, such as hospitals, interprofessional primary care teams, and long-term care homes.

Effective July 1, 2025, nurse practitioners will gain the ability to perform several new tasks, including ordering and applying defibrillators and cardiac pacemakers, conducting electrocoagulation procedures for skin conditions, and certifying deaths in broader circumstances to improve end-of-life care for families. Registered nurses will also be authorized to certify expected deaths, facilitating timely death registrations while preserving dignity for the deceased and their families. These changes aim to enhance access to care, particularly for Indigenous communities and residents in rural, northern, and remote areas.

This initiative complements the government's ongoing $500 million investment to bolster the healthcare system by recruiting and training more nurses. Efforts include educating new nurses, creating opportunities for existing nurses to upskill, and reducing barriers for internationally trained nurses to practice in Ontario.

Photo by glenn-carstens-peters on Unsplash

Ontario Helping Workers Plan for Retirement

Ontario is implementing a permanent framework for target benefit pension plans to help workers prepare for retirement while supporting the sustainability of multi-employer pension plans.

This framework, effective January 1, 2025, aims to encourage more employers to adopt these plans, enabling workers to build their retirement savings. Target benefit pension plans provide retirees with a reliable monthly income while offering employers predictable costs. These plans are often created by unions or industry associations, particularly in sectors like the skilled trades, allowing members to retain their pension participation even when switching employers. This portability promotes job mobility and attracts more workers to skilled trades.

The new framework ensures clear rules and responsibilities to support stability for workers and retirees. Following consultations with industry stakeholders, the government finalized regulations to establish this framework. Multi-employer pension plans wishing to convert their benefits to the target benefit model can apply for regulatory consent beginning in 2025.

The framework incorporates measures to strengthen plan governance, enhance member communication, and improve funding management. The government plans to monitor the new system to ensure it meets its objectives and continues to address the needs of workers and retirees.

Ontario Divisional Court finds Private Group Chats can lead to Discipline in the Workplace

On April 2, 2024, the Ontario Divisional Court issued its decision in *Metrolinx v. Amalgamated Transit Union, Local 1587*, a judicial review of an arbitration ruling by the Grievance Settlement Board (GSB). The case highlights that private group chats can give rise to workplace discipline and confirms that employers have a statutory obligation to investigate harassing behaviour and protect against hostility in the workplace regardless of whether a victim cooperates.

The Arbitrator's Decision

The arbitration centered on whether the termination of the five employees was appropriate after their conduct in a WhatsApp group chat was investigated. The employer's human resources department discovered the chat during an unrelated investigation. The messages contained offensive, sexist, and derogatory remarks about coworkers, primarily women, including lewd suggestions about how a female employee ("Ms. A") allegedly obtained a promotion through sexual favours.

Although Ms. A received screenshots of these messages and reported them to her supervisor, she chose not to file a formal complaint or participate in an investigation. Despite her reluctance, the employer proceeded with an investigation, ultimately terminating the employees involved.

The arbitrator concluded that the terminations were unjustified and ordered reinstatement with back pay. Key findings supporting this decision included the fact that the WhatsApp messages were intended to be private, and the employer lacked "express contractual, statutory, or judicial authority"

to access them. The arbitrator also found that Ms. A's refusal to file a formal complaint or participate undermined the investigation's impartiality, creating a conflict of interest for the employer acting as both "complainant" and "investigator." Ms. A's refusal to cooperate indicated she did not perceive the conduct as harassment or indicative of a hostile work environment. Accordingly, the arbitrator found that there was no evidence of the messages negatively affecting the workplace.

Judicial Review by the Divisional Court

The Divisional Court concluded that the arbitrator's reasoning was fatally flawed and remitted the matter to a different arbitrator for reconsideration.

In quashing the decision, the Court held that the grievors' claims of privacy were outweighed by the fact that the WhatsApp messages impacted the workplace once they came to Ms. A's attention. The Court noted that the nature of social media inherently involves the risk of messages being shared, as occurred in this case.

The Court further found that the arbitrator failed to acknowledge the employer's statutory obligation to investigate workplace harassment under the *Ontario Human Rights Code* and the *Occupational Health and Safety Act* (*OHSA*), regardless of whether a formal complaint was made. It emphasized that this duty ensures a workplace free from offensive and demeaning behaviour, protecting all employees.

The Court went on to make clear that it was legally incorrect for the arbitrator to conclude the investigation should have ended because Ms. A or other employees did not file a formal complaint. The arbitrator improperly relied on assumptions about how a victim of sexual harassment is expected to react, ignoring that reluctance to report harassment may stem from various factors, such as embarrassment, fear of retaliation, or the hope that the behaviour will stop.

The Divisional Court's decision underscores several key takeaways for employers, including:

1. Private conversations on platforms like WhatsApp can become workplace issues if they affect employees or the workplace environment;
2. Employers are legally required to investigate potential harassment, regardless of a victim's reaction or willingness to participate. Victims may avoid filing complaints or participating in investigations for various reasons, including fear of reprisal or further harassment. Such reluctance cannot negate an employer's obligation to act; and
3. Employers should reject outdated assumptions about how victims of workplace harassment "should" behave, recognizing that atypical reactions should not undermine the seriousness of harassment claims.

Dufault v. Ignace (Township), 2024 ONCA 915 – Key Ruling on Termination Provisions

This case focuses on the enforceability of a fixed-term employment agreement. The agreement specified a two-year employment term, but the employer ended the relationship just three weeks in, citing early termination provisions within the contract.

The lower court found that the agreement's "for cause" and "without cause" provisions were drafted in a manner that could theoretically infringe the employee's rights under the *ESA*. Specifically, language allowing the employer to terminate employment "at any time" and at the employer's "sole discretion" was deemed potentially inconsistent with the *ESA*'s statutory leave and reprisal protections.

The court concluded that the mere possibility of such a breach rendered the termination provisions unenforceable. Consequently, the employee was awarded 101 weeks' worth of compensation—the remainder of the fixed term.

This decision poses an issue for Ontario employers, as phrases like "at any time" and "sole discretion," previously common in employment agreements, now posed a risk of exposing employers to common law reasonable notice obligations. These obligations significantly exceed the *ESA*'s minimum notice and severance requirements.

Court of Appeal

The Court of Appeal chose not to address the contentious issue of whether language permitting termination "at any time" and at the employer's "sole discretion" violated the *ESA*. Instead, the court limited its analysis to the "for cause" provision.

The court found that the "for cause" provision contravened the *ESA* by defining termination grounds more broadly than the "wilful misconduct" standard established under the statute. This approach aligns with the *Waksdale* decision, which set a clear precedent in Ontario. As a result, the court deemed it unnecessary to consider other issues raised on appeal.

Takeaways for Employers

The *Dufault* decision underscores the importance of reviewing and updating employment agreements. Language such as "at any time" and "sole discretion," common in employment agreements for decades, may now frequently be challenged under the *ESA*. Employers who fail to revise their agreements may face costly repercussions, including exposure to extended notice obligations at common law.