BIRD RICHARD
LAWYERS FOR EMPLOYERS

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AODA: Accessibility Compliance Reporting Deadline Approaches

An important reminder that businesses and non-profit organizations with 20 or more employees must submit an Accessibility Compliance Report by December 31, 2026, confirming whether they have met their obligations under the *Accessibility for Ontarians with Disabilities Act*, 2005 (*AODA*). Filing the report is a legal obligation under the *AODA* and failure to comply may result in enforcement measures.

The reporting requirements include self-assessment questions confirming that your organization meets the *AODA* accessibility standards. The aim of the *AODA* is to create accessible workplaces, services and communications for people with disabilities and supports a more inclusive Ontario.

Reports can be submitted through the Accessibility Compliance Reporting Portal: https://accessibilityreporting.ontario.ca.

Ontario Labour Relation Board's New Guidance on "Appropriate" Workplace Investigations

A recent decision marks the first time that the Ontario Labour Relations Board (the "Board") considered the scope of the duties imposed on employers regarding workplace harassment investigations under the *Occupational Health and Safety Act (OHSA)*. Critically, the Board's decision offers procedural guidance on how to undertake a workplace harassment investigation that meets the *OHSA* requirement to be "appropriate in circumstances".

In *Alyssa Gassi v. The Corporation of the County of Lambton*, the Applicant reported a complaint alleging that she was being harassed in the workplace. The complaint was investigated by the employer and was found not to be supported. The Applicant's employment was terminated thereafter for reasons the employer claimed were unrelated to her workplace harassment complaint. The Applicant filed a complaint with the Ministry of Labour asserting that the investigation

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was "not appropriate in the circumstances" as required by the *OHSA*. The Inspector declined to issue any Orders in relation to the Applicant's Ministry of Labour complaint. The Applicant appealed the Inspector's decision to the Board and further advanced a reprisal application asserting that she was terminated for exercising her right under the *OHSA* to report workplace harassment.

The Board found that the employer successfully demonstrated that Applicant's termination was not due to her harassment complaint, but rather her performance and conduct issues. While the proximity in time between when the Applicant made her complaint of harassment and her termination attracted greater scrutiny, the Board found that proximity in time alone was not sufficient to establish reprisal.

Despite its determination that the employer did not reprise against the Applicant, the Board found that the workplace harassment investigation was not "appropriate in the circumstances" for three reasons:

i) The internal investigator unilaterally decided to only meet with one witness (out of many) to determine that the Applicant's complaint was unfounded;

ii) The investigator did not explain his reasoning why only meeting with one witness was sufficient enough; and

iii) The investigator did not give the Applicant an opportunity to respond to the information that the investigator uncovered notwithstanding his representation to her that she would be able to do so.

The decision offers valuable guidance for employers when conducting an "appropriate" workplace investigation, including:

i) Investigation must balance the rights and interests of all parties involved and that the investigation is procedurally fair;

ii) Employers do not necessarily need to hire a third-party investigator in every instance, so long as the internal investigator is impartial, has some understanding of workplace harassment and *OHSA* provisions, and ideally has some knowledge of workplace investigations;

iii) Investigators do not necessarily need to look into every allegation or require every named person in the complaint to be interviewed as long as it is justified; and

iv) Investigators need not provide a copy of the entire investigative report to the complainant but must inform the complainant of the investigation results in writing.

Moving forward, the key takeaway for employers should be to use a well-documented, thoughtfully conducted investigation as one of your strongest risk management tools. Investing in *OHSA* and workplace harassment training for your investigators, following a consistent process, and carefully documenting reasons for the decisions can help ensure your workplace investigations withstand legal scrutiny.

Corporate Structure Won't Shield Employers from Common Employer Doctrine

A recent Ontario Court of Appeal decision serves as a caution to employers who are interrelated with another legal entity, but wish to treated as distinct for liability purposes. Overlapping control of employee matters between interrelated legal entities may result in the entities being deemed a common employer for the purposes of employment obligations and liability.

In *Boyce Estate v. 2113626 Ontario Inc. (Hampton Inn and Suites)*, the employee was hired as a hotel manager under a three-year, fixed-term contract. Her employment was terminated after five months. The employee subsequently brought a wrongful dismissal claim against the company that operated one part of the defendant's family business. The operating company was found to be her employer and was ordered to pay $120,000 in damages. However, it was ultimately unable to satisfy the judgment. The employee then pursued a claim against the defendant's related property company, arguing that it was also her common employer.

The claim proceeded by way of summary judgment. The motion judge applied the common employer doctrine in finding that the defendant's related property company was, in fact, a common employer and therefore jointly liable to satisfy payment of the original judgment.

The common employer doctrine permits a court, in appropriate circumstances, to treat separate but related legal entities as a single employer for the purposes of determining liability for employment-related obligations, including outstanding wages, termination pay and severance pay.

In upholding the motion judge's decision, the Court of Appeal confirmed the two-part test for determining application of the common employer doctrine:

a) First, the court must determine whether there is a significant degree of interrelationship and common control between or among the alleged common employers; and

b) Second, the court must assess whether the employee held a reasonable expectation that the other companies or entities were party to their employment contract.

On the first prong of the test applicable to the common employer doctrine, the two interrelated businesses were found to have overlapping control and were both involved in the same hotel operations.

On the second prong of the test, the Court examined conduct related to hiring, payment of wages, method of work, and ability to dismiss, among others, in finding that the employee had a reasonable expectation that both businesses were party to the employment contract.

The decision sends a clear message to employers: the common employer doctrine looks to the realities of the employment relationship and assigns liability accordingly. Where affiliated companies share various aspects of the employment relationship, such as management, HR and payroll, and operational control, the distinction between the entities may become less meaningful from an employment law perspective.

Moving forward, employers who operate multiple corporate affiliations but wish to ensure their businesses remain legally separate should clearly define which corporation employs, signs employment agreements, oversees payroll, supervises, etc. If multiple entities are actively involved in an employee's relationship, employers should take steps to ensure clear lines of liability are maintained.

Recent Ontario Decision Raises Potential for *Wallace* Damages

Terminating an employee for cause is one of the highest-risk decisions an employer can make in the employment relationship. This is because the financial consequences for a termination that is found to be unfair or in bad faith can, and often do, extend well beyond the employee's standard entitlement. A recent Ontario Superior Court decision serves as a striking reminder that the reason for termination is one of, if not the most important, part of the termination process.

In *Wilsher v. Olympic Wholesale*, 2026 ONSC 3620, the Court awarded a terminated employee the equivalent of 33 months' pay in lieu of notice; 19 months for reasonable notice, plus a further 14 months of *Wallace* damages. The employee, a 55-year-old with 17 years of service, was dismissed for willful misconduct after manually "topping up" employees' timesheets. The employer characterized the conduct as fraud and time theft, while the employee had argued that "topping up" shifts was a longstanding practice within the company. The Court overturned the termination, determining that the employee was taught how to "top up" during training. The "topping up" practice had existed for years and continued after the employee's termination and the employee herself never benefited from the "topping up".

The Court in *Wilsher* relied on the decision in *McKinley v. BC Tel* and *Wallace v. United Grain Growers Ltd.* instead, which determined that a notice period may be extended as compensation for an employer's bad faith or unfairly treatment of an employee in the course of dismissal. This is particularly concerning for employers because it re-opens the door to the possibility of damages being tied to automatic extensions of notice periods rather than tying compensation to the actual harm suffered, by way of aggravated, punitive, or general damages.

Additionally, the decision is significant for employers because it signals that courts may be prepared to move beyond the traditional 24-month presumptive ceiling for reasonable notice, even in the absence of truly exceptional circumstances. The 33-month notice period introduces a greater uncertainty into termination liability and highlights the need for employers to carefully assess notice obligations when making termination decisions.

Key Takeaways for Employers

Moving forward, to avoid having to pay out lengthy and unwarranted notice periods, employers should:

- Carefully investigate the employee's conduct/actions and whether they were consistent with workplace practices;
- Consider all past training the employee has done; and
- Ensure the termination is handled fairly, respectfully, and with all policies/evidence to support it.

Ontario Court of Appeal Finds "at any time" and "for any reason" Language Consistent with the *ESA*

The decision in *Baker v. Van Dolder's Home Team Inc.; Li v. Wayfair Canada ULC*, 2026 ONCA 568 has finally given employers some welcomed clarity on a recurring employment law headache regarding when a termination clause is in violation of the *Employment Standards Act, 2000* (*ESA*).

This Ontario Court of Appeal case considered two appeals involving their respective termination provisions; one that permitted termination "at any time" and the other that permitted termination "at any time and for any reason." The Court unanimously rejected the argument that these words, standing alone, make a termination clause unenforceable and emphasized that employment contracts must be interpreted as a whole, with an understanding of what the parties intended in their surrounding circumstances.

In *Baker v. Van Dolder*, the employee's contract provided for termination without cause "at any time," and limited the employee's entitlements to the minimum entitlements required by the *ESA*. On appeal from a motion judge's ruling who found the provision to be unenforceable, the Court held that the wording was, in fact, consistent with the *ESA*. In particular, the Court interpreted "at any time" to mean that the employer could terminate the employee at any point it chose, subject to the statutory requirements. It did not mean the employer had a right to disregard these restrictions on termination.

The second appeal, *Li v. Wayfair Canada ULC*, involved a provision allowing termination "at any time and for any reason." The Court also found the language enforceable when read in the context of the agreement as a whole. Importantly, the Court rejected a highly literal approach that treated isolated words such as "any time" or "any reason" as automatically invalid. Instead, the question that should be

before courts is what the parties objectively intended for the contract to mean.

Baker and *Li* move Ontario employment law away from a literal approach with respect to termination clauses and towards a more practical, whole-contract analysis. Despite this win for employers, the drafting strategy remains the same. Always draft carefully, expressly preserve *ESA* minimums, and have termination language reviewed before relying on it.

Temporary Lay-off Clause Found to be Separate from Termination Clause

In a welcomed decision for Ontario employers, the Ontario Court of Appeal in *Taylor v. Salytics Inc.*,2026 ONCA 621 has confirmed that a contractual temporary layoff provision does not automatically become unenforceable in termination clause provisions.

The case involves an employer who temporarily laid-off an employee in accordance with the terms of the governing employment agreement and the *ESA*. The employer recalled the employee to work at full hours and pay within six months. Nonetheless, the employee claimed that the lay-off constituted a constructive dismissal.

The governing employment contract contained an invalid "for cause" clause, rendering the entirety of the termination clause unenforceable (*Waksdale* principle). The employee argued that the lay-off provision was part of the termination clause and therefore it should also be found unenforceable. The application judge rejected his claim, and Mr. Taylor appealed.

Despite that the "for cause" termination provision was invalid, the Court ultimately refused to apply the *Waksdale* principle. The temporary layoff provision was found to be separate from a termination provision because the *ESA* explicitly treats temporary layoffs differently from terminations. Notably, the contract limited the employer's ability to lay off employees to situations where the lay-off complied with the *ESA*, which meant the clause did not attempt to avoid the minimum legal standards set by the *ESA*.

The employee also pointed to the location of the lay-off provisions, under the "termination" heading, in support of his argument. The Court rebutted this argument and found that the location of the clause did not change its legal meaning.

Moving forward, employers should keep in mind the decision in *Taylor* as a strong reminder that careful contract drafting can make a real difference when business conditions force difficult staffing decisions. Employers who wish to add a temporary layoff provision or continue its preservation should ensure:

- Their employment agreements expressly authorize them;
- Clearly link the authority to do so to the *ESA*;
- Respect the statutory limits on the duration and conditions of a temporary layoff; and
- Review termination provisions separately.

Kondaj v. Crossbridge Condominium Services Ltd.

The decision in *Kondaj v. Crossbridge Condominium Services Ltd.,* serves as a cautionary reminder that when employers undergo contract changes specific to building service providers, the incoming provider may inherit more than just the contract itself. Wrongful dismissal claims may also flow from the change.

The case arose after the SoHo Hotel & Residences Shared Facilities replaced Crossbridge Condominium Services Ltd. with Duka Property Management Inc. as its property management provider. Mr. Kondaj, who worked as a building manager, was not retained by Duka when they took over the contract, and Crossbridge chose to not reassign him to another property. Although Duka paid Mr. Kondaj his statutory termination entitlements, neither company provided him with common law reasonable notice, with each arguing that the other was responsible for doing so. The motion judge held Duka liable for 10 months' reasonable notice, amounting to $78,925, as well as damages in lieu of lost benefits and Duka appealed.

The Ontario Court of Appeal reaffirmed the motion judge's decision and determined that it is the responsibility of the new building service provider to pay the terminated employee's common law reasonable notice entitlements if that new building service provider does not retain the employee of the previous provider.

The Court of Appeal upheld the motion judge's interpretation of the *ESA*'s building services provisions, whereby an incoming building service provider can be liable for more than just the minimum termination payments required under the *ESA*.

This decision is a significant warning for building service providers and should reinforce the following:

- Treat employee transitions as a core part of every building service contract change;
- Incoming building providers must assess what their common law exposure will be under the *ESA* before enacting workforce changes; and
- Outgoing building providers should review and address any workforce transition responsibilities in their agreements.