EMPLOYMENT & LABOUR

COVID-19 and difficult decisions for employers: Employment challenges in 2020

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The year 2020 has been momentous for employment law. Human resources professionals, legal counsel and others have been forced to deal with constantly shifting rules and evolving legal risks. These changes have arisen not only from the impacts of the COVID-19 pandemic, but also from key case law developments that could profoundly affect the interpretation and enforceability of employment contracts, arbitration clauses and compensation plans.

COVID-19 in the workplace

There has been a significant amount written about COVID-19 and the impact of the pandemic on workplaces in Canada. These are our key takeaways. Please refer to Osler's COVID-19 Workplace Playbook for more detail on these and other topics related to COVID-19 and the workplace.

Remote work can create as many problems as it solves

Over the spring and summer of 2020, many employers – some of whom were forced to adopt "work from home" arrangements hastily as their workplaces were closed – quickly began to embrace the flexibility (and in some cases, cost savings) of having employees working from home (or "working virtually" elsewhere). Some employers have been surprised to learn that laws related to the physical workplace can also apply to remote workplaces. Here are examples of some of the issues associated with remote work:

- *Employment standards legislation:* The minimum requirements contained in employment standards legislation, such as those relating to hours of work, meal periods and overtime, are not suspended or limited when employees are working remotely from home or elsewhere. As such, employers should consider whether and how they will monitor employees' working time – not necessarily (or exclusively) to manage performance or productivity, but also to ensure that all applicable minimum requirements are complied with. This can be a challenge, particularly without the ability to directly supervise the workplace. Clear policies that are communicated to employees, including those addressing hours of work, can assist in this regard. This protection can be enhanced when coupled with software and systems, including self-reporting mechanisms, that facilitate compliance with employer record-keeping obligations.
- *Workers' compensation when working virtually:* Just as workplace injuries can lead to workers' compensation claims in the physical workplace, employees working virtually who become injured in the course of their employment at home may also be covered by the applicable workers' compensation regime. Coverage will depend on where and when the injury occurs, as well as the activity the employee was engaged in at the time of the injury. For employers whose businesses are covered by a provincial workers' compensation insurance scheme, the determination of whether an injury is work-related must be made by the applicable workers' compensation board.
- *Working outside the employer's "home" jurisdiction:* A common request from employees is to work remotely outside the province or country where their employer is based. These types of arrangements are not without risk and should be approached with caution. For example, this situation raises questions as to whether workers' compensation coverage extends across jurisdictions and could expose employers to potential risk in the event of a workplace injury. For provincially regulated employers, the employment standards legislation in the province where the work is being performed may apply to the employee (and their employment contracts), notwithstanding that the employer's actual workplace is elsewhere. Similarly, employees working outside of Canada (and their employers) may be subject to the employment laws of the country in which they are working. Potential issues relating to tax, immigration, privacy and data protection should also be considered in connection with any extra-provincial remote work arrangements.

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COVID-19 screening requirements in Ontario have been codified

In late September, the Ontario government imposed mandatory COVID-19 screening requirements for Ontario workplaces (Mandatory Screening). Before that, COVID-19 screening was recommended, but not clearly mandated. As a result, employers (together with their legal counsel in some cases) were left to their own devices to create screening tools.

Mandatory Screening must be undertaken for all workers and "essential visitors" entering the workplace and includes a list of three questions:

1. Do you have any of the following new or worsening symptoms or signs? [The list of "official" symptoms is available here.]

2. Have you travelled outside of Canada in the past 14 days?

3. Have you had close contact with a confirmed or probable case of COVID-19?

If the person answers NO to all questions, they may be permitted to enter the workplace. If the person answers YES to any question, they must be prevented from entering the workplace. Employers are permitted to add to the content of the Mandatory Screening, but cannot take away from it. In particular, the list of symptoms that are screened for must, at a minimum, always include the symptoms listed in the Mandatory Screening.

When the Mandatory Screening was first implemented, there was no written guidance on how the pre-screening tool had to be implemented and employers were again left to their own devices to determine the best way of doing so. However, since the rollout of Mandatory Screening, the Ontario government has updated its guidance on developing a COVID-19 safety plan. As of the date of writing, this guidance now distinguishes between active and passive screening, and states that employers must now *actively* screen every worker. More details regarding active screening can be found in our Osler Update entitled "New (and mandatory) COVID-19 screening tool for workplaces" on osler.com. Employers must be aware that they cannot simply rely on employees to self-assess and determine whether they can come to work. Rather, a representative of the employer must review answers to the Mandatory Screening questions and make an assessment of whether the individual can enter the workplace.

Physical workplace safety measures remain imperative

As always, evaluating and addressing the risks related to COVID-19 transmission in the physical workplace represents one of employers' key obligations. Osler's COVID-19 Workplace Playbook provides an extensive overview of these obligations and steps for addressing COVID-19 related risks in the workplace. At a minimum, employers are required to have specific COVID-19 safety plans in place that are designed to mitigate risks in the context of their workplaces. These plans should ideally be developed in consultation with, and regularly reviewed by, the workplace joint health and safety committee.

Check, check again and then re-check public health guidance and government directives

The importance of public health guidance and government announcements and directives to employment law considerations has increased dramatically since the start of the pandemic. A key takeaway from this year is that the information published by various public health and governmental authorities is apt to change and will do so frequently with little or no notice. In contrast with legislation, the public health advice and guidelines that employers must follow are now often spread across multiple federal, provincial and municipal websites. These websites can and do change from week to week, and the sheer volume of public health messaging can be difficult to track, especially for industries considered to be higher-risk. As such, to the extent that employers are basing decisions relating to their workplaces on public health and government recommendations, it is important to keep a record of that advice (e.g., by saving a copy of the website as it existed on the date of the decision and keeping it on file) in case such decisions need to be justified later.

Key case law developments

In 2020, a number of important case law developments are presenting challenges for employers in Canada. The trend in the jurisprudence continues to be towards strict judicial scrutiny and interpretation of employment contracts and incentive plans and policies. The net effect of these decisions is to drive severance costs higher for businesses and/or increase uncertainty regarding contract enforceability. A selection of the most impactful employment law cases from 2020 are highlighted below.

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Matthews v. Ocean Nutrition Canada Ltd. (Matthews)

The Supreme Court of Canada's decision in *Matthews* centered around a company's long-term incentive plan (LTIP), which stipulated that the plaintiff employee would be entitled to a payout if the company was sold. The LTIP also contained exclusion clauses, which stated that: a) the LTIP did not apply to employees who resigned or were terminated, whether with or without cause; and b) that the LTIP would not be included in the calculation of severance. The employee in question was constructively dismissed and the company was sold within the notice period. The employee claimed that he should have received the LTIP payment notwithstanding the earlier termination of employment and the exclusion clauses.

The Supreme Court of Canada unanimously held that the exclusion clauses in the LTIP did not remove the employee's entitlement to the LTIP payout and that the employee was entitled to damages. To assess whether compensation, such as under an LTIP, would be owing despite the employee's termination, the Court considered

1. whether, but for the termination, the employee was entitled to the bonus or benefit during the reasonable notice period
2. whether the bonus or benefit plan unambiguously alters or removes the employee's common law right to damages within the notice period

On the second branch of this test, the Court embraced a highly technical framework that distinguished between the right to the award/benefit/bonus/payment (the award) itself and the separate right to claim damages in respect of the lost opportunity to earn the amount of the award. As a result, all employers doing business in Canada should revisit their compensation plans, contracts and policies to ensure the operative language addresses the issues presented by this ruling.

More commentary regarding *Matthews* can be found in our our Osler Update entitled "SCC puts employers on notice regarding long-term incentive plans" on osler.com.

Waksdale v. Swegon North America Inc. (Waksdale)

In *Waksdale*, the Ontario Court of Appeal held that termination provisions in an employment contract are indivisible, regardless of how they are organized or where they appear in the written document. As a result, an unenforceable "with cause" provision will render the entire termination clause unenforceable, including an otherwise enforceable "without cause" provision. The Court of Appeal also confirmed that a severability clause purporting to sever the offending provision rather than invalidating the entire clause or agreement will be ineffective to excise the offending part of the termination clause and save the remaining provision.

As in *Matthews*, the Court in *Waksdale* confirmed that courts will look for any technical flaw in termination language in order to award employees higher severance amounts. As a result of *Waksdale*, employers in Ontario should be reviewing and updating all of their termination clauses and standard form offer letters or employment agreements, including their executive agreements.

More commentary regarding *Waksdale* can be found in our Osler Update entitled "The Ontario Court of Appeal's latest decision striking down attempts to control severance cost" on osler.com.

Uber Technologies Inc. v. Heller (Uber)

In a highly anticipated decision, the Supreme Court of Canada in *Uber* held that drivers could proceed with a class action against Uber in the Ontario courts alleging violations of employment standards laws. Uber could not rely on an arbitration clause in its standard form services agreement that would have required the drivers to pursue their claims before an arbitrator in the Netherlands. The majority of the Court determined that the arbitration clause was unconscionable on the basis that: 1) there was an inequality of bargaining power between the parties; and 2) the arbitration clause amounted to an improvident bargain, as it required Mr. Heller to pay up-front administrative fees almost equal to his annual income from Uber and travel to a foreign jurisdiction in order to pursue a dispute.

The Court left undisturbed the Ontario Court of Appeal decision that held that arbitration clauses will be unenforceable if, on their face, they preclude access to the statutory complaints process involving the Ministry of Labour that employees are entitled to benefit from under employment standards legislation. As a result, companies who intend disputes to be handled in a confidential arbitration setting pursuant to an arbitration clause in an employment or independent contractor agreement should be reviewing those agreements to ensure that the language will withstand judicial scrutiny.

More commentary regarding *Uber* can be found in our Osler Update entitled "Supreme Court of Canada rules Uber arbitration clause invalid and a 'classic case of unconscionability'" on osler.com.

Battiston v. Microsoft Canada Inc.

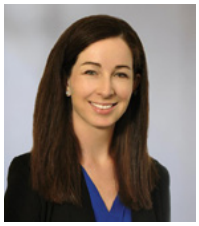
As discussed in our article, A year of upheavals and dashed expectations: Executive compensation developments in 2020, an Ontario Superior Court of Justice decision held that forfeiture of unvested long-term incentive awards on termination of employment without cause was "harsh and oppressive."

The case is on appeal to the Ontario Court of Appeal and, while Osler was not counsel at trial, we are representing Microsoft for the appeal.

Conclusion

Going into 2021, there remains significant uncertainty with respect to both the course of the COVID-19 pandemic and the effect it will have on workplace issues, as well as the impact of recent employment law jurisprudence in Canada. Companies should continue to monitor these and other legal developments related to the workplace in order to ensure that they are effectively managing human resources risks to their businesses.

AUTHORS



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