

THE IMPORTANCE OF KEEPING CURRENT

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Melissa Seal, B.A. (Hons), LLB

Partner

Email: mseal@tmlegal.ca

Phone: (613) 542-1889 ext. 2206

AGENDA

- **Why periodic reviews are important**
- **Contracts**
- **Policies**
- **Procedures- Best Practices**

PERIODIC REVIEWS

Periodic reviews of your policies, procedures, and contracts are key to ensuring:

- Fairness
- Clarity
- Enforceability

FAIRNESS

- Recruitment & Retention
- Discourage Unionization
- It's the right thing to do!

CLARITY

- If everyone knows what to expect,
- And the expected happens,
- There is very little left to fight about.
- Uncertainty costs money!

ENFORCEABILITY

- Helps achieve intended results
- Saves money and time

FOCUS ON ENFORCEABILITY

CONTRACTS

- **Proposed changes to ESA & LRA**
- **Case Law**
- **How to fix them**

POLICIES

- **Bill 119**
- **Gender Expression**
- **Technology Use & Social Media**

PROCEDURES- INVESTIGATIONS

- **Bill 132**
- **Case Law**
- **Internal Investigations**

CONTRACTS

Proposed changes to the Employment Standards Act

The **Changing Workplaces Review Interim Report** proposes many changes to the ESA, some of them are downright scary!

- Changes to the current exempted professions, particularly overtime pay for managers
- Reduce the overtime pay trigger from 44 to 40 hours a week
- Increase vacation entitlement to 3 weeks after a certain period with the same employer

Proposed Changes to the Employment Standards Act

- **Remove 50 employee threshold for access to Personal Emergency Leave**
- **Introduce paid sick leave**
- **Provide “Just Cause Protection” so that employees may not be terminated without just cause(!)**

Proposed Changes to the Labour Relations Act

- **A card-based system for certification**
- **Provide unions with employee lists (with or without contact information)**
- **Increase penalties under LRA to create more of a deterrent for employers who violate the Act**

GIVE YOUR FEEDBACK

- **This affects you!**
- **‘Changing Workplaces Review’**
- **Deadline for feedback: October 14, 2016**

www.labour.gov.on.ca/english/about/workplace/



Stevens v Sifton Properties, 2012 ONSC 5508

- Employee was terminated without cause
- Termination clause in Stevens' contract stated that she would be paid ESA notice entitlement only
- The employer paid (and always intended to pay) benefits for the notice period
- But, because the termination clause did not mention benefits, and inferred that the notice entitlement was all she would receive, the clause was found to be void
- **See also:** Wright v Young & Rubicam Group of Cos. (Wunderman), 2011 ONSC 4720

Howard v Benson Group, 2016 ONCA 256

- Employee had a 5 year term contract, early termination provision entitled employee to ESA notice if terminated without cause.
- Employee was terminated after 23 months; employee sued for breach of contract
- Termination provision was found unenforceable by lower court due to vagueness
- Because there was no valid termination provision, fixed term employee was entitled no to common law notice, but for payment of the remainder of the contract.
- Not subject to mitigation

Holland v Hostopia.com Inc., 2015 ONCA 762

- Employee accepted a written offer of employment and began work. No mention of termination entitlements in the offer.
- After he started working, he was presented with an employment agreement which gave ESA entitlements only upon termination, and changed the terms of a code of conduct he signed on his first day.
- Employee was terminated, and paid only ESA entitlement
- Was awarded 8 months notice plus commissions by Court of Appeal

WORRIED ABOUT YOUR CONTRACTS?

Making changes can be tricky:

- Not always straightforward
- The wrong approach can affect morale

Wronko provides insight and new direction...

Wronko v Western Inventory Service Ltd.

2008 ONCA 327

- Employer attempted to get employees to sign new contracts changing the termination clause from 2 years to 30 weeks.
- Mr. Wronko refused, assumed he'd been terminated and demanded 2 years pay (per the clause in his contract)
- Trial judge found that Wronko resigned, but Court of Appeal found that Wronko had been terminated and because he hadn't signed the new contract, was entitled to the termination amount in the original contract.

POLICIES

Bill 119: PHIPA

- Major Changes to PHIPA
- Revise policies
- Training
- Sign off
- Ask for help



GENDER EXPRESSION



- Gender Identity and Gender Expression were added to the OHRC as a protected ground in 2012
- **Affects:** Dress Code, possibly change room and bathroom policies

TECHNOLOGY & SOCIAL MEDIA

- Expectation of privacy
- Acceptable uses of company devices/network
- BYOD
- Personal social media accounts

R. v COLE, 2012 SCC 53

- School teacher had child pornography on his work computer
- School's policy did not specify that there was no expectation of privacy
- School turned the laptop over to police, who had no warrant
- Supreme Court found that Cole's Charter rights had been violated by the warrantless search
- Evidence was excluded

CRIMINAL CODE

Interception

184 (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

CRIMINAL CODE

Saving provision

184 (2) Subsection (1) does not apply to:

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

PROCEDURES:

Focus on Investigations

Bill 132: Discrimination, Harassment & Violence in the Workplace

- **Changes to OHSA**
- **Revise policies**
- **Training**
- **Sign off**
- **Ask for help**

Canada (AG) v PSAC, 2015 FCA 273

- Pre-screening by employer should be fact-finding only
- Under Federal OHSA, there is a mandatory duty to appoint a ‘competent person’ if workplace violence cannot easily be ruled out through pre-screening
- ‘Competent person’ must be seen by both parties to be impartial

Canada (AG) v PSAC, 2015 FCA 273 **Cont'd**

In Ontario, employers are currently not obligated to select an external competent person to conduct the investigation, **HOWEVER** if employers choose investigate internally, is very important to do it correctly.



QUESTIONS?

Melissa Seal, Partner

email: mseal@tmlegal.ca

phone: (613) 542-1889 ex. 2206