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# *Lessons Learned from 2020 and What to Expect in 2021*

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*The webinar will begin at 9:00am EST*



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# *Agenda*

## ■ Termination and Closure

- Does the requirement to work-from-home or return to the office constitute constructive dismissal?
- Termination during Infectious Disease Emergency Leave (“IDEL”).
- What is mass termination?
- Recent case law on the enforceability of employment agreements.

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# *Agenda*

## ■ A Return to “Normal”

- Managing an accommodation request related to mental health and COVID-19 fears.
- How long can an employee remain on IDEL?
- Can an employer require an employee to be vaccinated for COVID-19?

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# TERMINATION AND CLOSURE



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# *Work Location & Constructive Dismissal*

- Constructive dismissal arises when an employer makes a unilateral and substantial change to an essential term of the employment contract.
- A temporary requirement that an employee work-from-home to comply with a public health recommendation or direction is unlikely to constitute a constructive dismissal.

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# *Work Location & Constructive Dismissal*

- By contrast, a permanent work-from-home arrangement may constitute constructive dismissal **if** this change has a material, detrimental impact on the employee.
  - Inadequate work space, interference with family life, *etc.*
  
- If concerned about the risk of constructive dismissal:
  - Obtain employee agreement to the change (may be easy if employee sees arrangement as a benefit); or
  - Provide working notice of the change (seek legal advice as notice requirements can be tricky).

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# *Work Location & Constructive Dismissal*

- If work-from-home is a temporary arrangement, a requirement to **return** to work onsite is unlikely to be a constructive dismissal.
  - Not a “change” to the employee’s normal working conditions.
- However, restricting ability to work from home may constitute constructive dismissal if it was a pre-existing term or condition of employment.  
(*Hagholm v. Coreio Inc.* 2017 ONSC 7713)

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# *Termination During Infectious Disease Emergency Leave*

- IDEL is a protected leave under Ontario's *Employment Standards Act, 2000*
  - In most cases, a request for IDEL arises because:
    - Of the employee's own COVID-19 related risk factors.
    - The employee is providing “care and support” to a family member for a COVID-19 related reason.
    - The employee has been laid off due to a work shortage and therefore “deemed” to be on IDEL per Ontario Regulation 228/20.

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# *Termination During IDEL*

- Because IDEL is a protected leave under ESA:
  - Employer cannot threaten, fire or penalize an employee for taking IDEL.
  - Employee is entitled to return to former position or, if the position is eliminated while the employee on IDEL, a comparable position (if it exists).
- These protections do not restrict an employer from terminating employment provided the reason is unrelated to the leave (e.g., business closure).
- However, if an employee is terminated due to an absence covered by IDEL, this is a violation of the *ESA*.

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# *Termination During IDEL*

## *~Takeaways*

- If terminating an employee on IDEL, be prepared to explain why and how the termination is unrelated to the leave.
- If the terminated is for a reason related to the IDEL, the employee may be entitled to reinstatement (if sought) and back pay.
- When in doubt, seek legal counsel.

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# *Mass Termination (Ontario)*

- Termination of 50 or more employees in the same “establishment” in any rolling four week period
  
- Increased *ESA* notice period:

<u>Number of Employees</u>	<u>ESA Notice (or Pay) Requirement</u>
50-200 employees	Eight (8) weeks
200-500 employees	Twelve (12) weeks
500+ employees	Sixteen (16) weeks

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# *Mass Termination (Ontario)*

- “Establishment” includes multiple locations in the same municipality.
  
- Mass termination does not apply if:
  - # of terminated employees  $\leq$  10% of # of employees employed for at least 3 months; and
  - Terminations not caused by the permanent discontinuance of part of business.

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# *Mass Termination (Ontario)*

- Prescribed information must be provided to Director of Employment Standards (Form 1).
- Employer must post Form 1 in the workplace on first day of notice period.
- Notice provided to employees not effective until Director receives Form 1.
- *Failure to follow technical requirements can be very costly!*

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# *Mass Termination*

## *~Takeaways*

- Mass termination provisions have many procedural requirements, and the failure to comply can have significant financial consequences.
- There may be ways to structure and/or time terminations so as not to trigger the mass termination provisions.
- *Seek legal advice if a mass termination is contemplated.*

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# *Enforceability of Employment Agreements*

- An employment agreement is the most effective way to limit liability arising from the termination of an employment relationship.
- However, courts are increasingly critical of any termination clause that limits an employee's common law entitlement.
- *Careful and professional drafting is critical!*

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# *Waksdale v. Swegon North America*

## *2020 ONCA 391*

- Employment agreement contained a termination “for cause” provision, and a termination “without cause” provision.
- The “for cause” provision identified a long list of conduct that would constitute cause.
- Employer admitted the “for cause” provision violated the *ESA* and was invalid.
- Employee argued an invalid “for cause” provision also invalidated the “without cause” provision.

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# *Waksdale v. Swegon North America*

- Motion judge found “without cause” was a stand-alone provision and enforceable.
- Court of Appeal disagreed: termination provisions must be read together - if one provision is invalid, the other is invalid as well.
- Case may be heard by the Supreme Court of Canada. Until then, *Waksdale* has significant implications for Ontario employment contracts:
  - Avoid listing conduct that will constitute cause.
  - Draft “for cause” language to account for potential entitlement to minimum employment standards.

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# A RETURN TO “NORMAL”



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# *Mental Health & COVID-19*

- What if an employee does not want to return to work due to a fear of COVID-19?
  
  - Consider:
    - Does employee have a diagnosed mental health condition;  
or
    - Is this a general fear or anxiety of contracting COVID-19?
  
  - If the former, employer may have an obligation to accommodate under the *Human Rights Code*.
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# *Mental Health & COVID-19*

- Employee must:
  - Establish existence of a disability; and
  - Provide detailed medical information about restrictions and limitations.
- Even if a disability exists, the employee is not guaranteed any particular or preferred result, such as a work-from-home arrangement.
- Employer is entitled to consider how the restrictions may be accommodated **in the workplace.**

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# *Mental Health & COVID-19*

## *~Takeaways*

- Employer is entitled to more than a doctor's note to support a continued work-from-home arrangement or leave of absence.
  - Accommodation can be considered in the workplace.
  - If no medical condition exists, an employee does not have a right to refuse to return to a safe work environment, and a continued refusal to return may lead to a termination of employment.
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## ***Duration of IDEL***

- An employee is entitled to remain on IDEL as long as they meet the qualifying criteria and COVID-19 remains an “infectious disease” under government regulation.
  - If the employee is “deemed” on IDEL because they were temporarily laid off for a COVID-19 related reason, “deemed” leave ends on January 2, 2021 (this deadline may be extended by the government).
  - Once not longer “deemed” on IDEL, employee reverts to being on temporary layoff under employment standards.
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# *Duration of IDEL*

## *~Takeaways*

- If an employee is on IDEL for reasons related to their personal and/or health circumstances, keep in contact with the employee to verify they continue to meet the eligibility requirements.
  - If you have employees “deemed” to be on IDEL due to a shortage of work, contingency plan **now** for how you will address the temporary layoff period should it resume on January 3, 2021.
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# *Mandatory Vaccination?*

- Vaccines are on the horizon for 2021.
  - Rate of uptake will be key.
  - Public willingness to take the vaccine is on the rise.  
Recent studies suggest:
    - 69% of Canadians plan to get a vaccine once available, an increase from 63% a month prior.
    - 22% have not yet decided.
    - 42% support mandatory vaccination.
  - Quantas (Australian airline) has said passengers must be vaccinated for international flights.
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# *Mandatory Vaccination?*

- Most case law on mandatory vaccination arises in the context of health care workers and the influenza vaccine.
  - Outcomes are mixed; in some cases mandatory vaccination has been upheld; in others, struck down.
  - In most cases, a mandatory vaccination policy has been upheld if:
    - An employee who refuses is not terminated or disciplined, but rather provided access to accrued vacation or unpaid leave.
    - The policy provides accommodation to an employee who cannot be vaccinated for medical or religious reasons.
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# *Mandatory Vaccination?*

- The historical case law may be of limited application in the context of COVID-19, because:
    - Public health and safety risks are more significant than influenza, particularly for vulnerable populations.
    - There may not be a “COVID-19 season” such that a leave or access to vacation time may not be feasible.
    - Initial suggestion is that COVID-19 vaccine may have a greater efficacy than the traditional flu vaccine, such that there is stronger scientific justification for a COVID-19 vaccine.
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# *Vaccination Policy*

- A non-unionized employer that implements a mandatory vaccination requirement may face a claim of constructive dismissal.
  - A unionized employer may face a policy grievance alleging the policy is unreasonable.
  - In either case, an employer may face a human rights claim if accommodation for disability or religious-related reasons is not considered.
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# *Vaccination Policy*

## *~Takeaways*

- Before implementing a mandatory vaccination policy, consider the following:
    - Does the workplace serve a vulnerable population?
    - What is the nature and duration of the employee's contact with that population?
    - Assess risk for different positions – may want to avoid an all-employee blanket policy.
  
  - Consider strategies to create buy-in, such as education and paid time off to get the vaccination.
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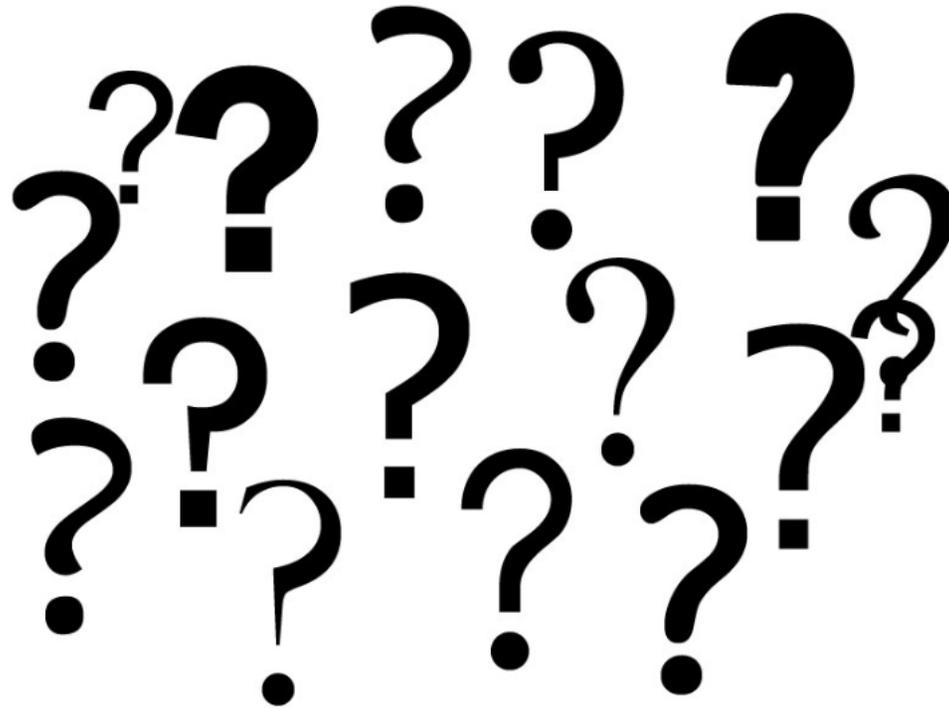
# *Vaccination Policy*

## *~Takeaways*

- Ensure the policy is clear and employees understand consequences for non-compliance.
  - Use public health guidance (and potentially legislation) to support and strengthen the position that vaccination is reasonable.
  - When in doubt, consult with legal counsel to evaluate the risk of a mandatory vaccination policy in your workplace.
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# *Questions?*





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