Working for Workers Act(s): What Employers Need to Know

The webinar will begin at 9:00 am EST

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Agenda

- Disconnecting from Work
- Non-Competition Agreements
- Electronic Monitoring
- *Occupational Health and Safety Act (OHSA)*
- The ‘Gig’ Economy

Disconnecting From Work

Disconnecting From Work

- Many EU countries have legislated a “right to disconnect” or required employers to implement policies to address disconnecting from work
- Ontario is the first North American jurisdiction to follow suit with recent amendments to the *Employment Standards Act, 2000* (“ESA”)

Disconnecting From Work

- Effective **June 2, 2022** an employer with 25 or more employees must have a written policy on disconnecting from work
- "Disconnecting from work" is defined as "*not engaging in work-related communications, including emails, telephone calls, video calls or sending or reviewing other messages, to be free from the performance of work.*"

Disconnecting From Work

- The policy must:
  - Apply to all employees (including management) but the policy does not need to be the same for all employees
  - Include the date it was prepared or amended
  - Include such information “as may be prescribed” (none at this time)

Disconnecting From Work

- Once the policy is prepared, an employer must:
  - Provide a copy to each employee within 30 days of the policy being prepared or amended
  - Provide a copy to a new employee within 30 days of hire
  - Retain a copy of the policy (and any revised versions) for at least three years after the policy ceases to be in effect

Disconnecting From Work

- **Significantly**, the ESA amendment does **not** create any "right" to disconnect from work in addition to the rights already provided by the *ESA*:
  - Hours of work and eating period
  - Vacation with pay
  - Public holidays

Disconnecting From Work

- If the policy grants an employee a “right to disconnect”, it can likely be enforced as a greater right or benefit under the *ESA*
- It is **critical** to ensure the policy does not unintentionally restrict the employer’s ability to manage its business

Disconnecting From Work

- What might the policy address?
  - Values regarding client service, work-life balance and mental health
  - How regular work hours are determined and to whom questions can be directed if an employee is uncertain about their regular hours of work
  - When an employee may be required to perform work outside regular hours

Disconnecting From Work

- What might the policy address?
  - How work performed outside of regular work hours is compensated
  - Procedures (*e.g.*, out-of-office notifications, voicemail)
  - Best practices for contacting colleagues outside of regular work hours
- *For assistance with your policy, contact any member of the SK team!*

Non-Competition Agreements

Non-Competition Agreements

- A non-competition agreement restricts an employee's ability to work for other businesses or individuals (including the employee's own business) in the employer's field for a prescribed period of time
- Historically courts have been reluctant to enforce a non-competition agreement because it can often be (but not always) an overly aggressive restraint of trade

Non-Competition Agreements

- With the amendments to the ESA, Ontario becomes the first jurisdiction in Canada, and one of only a few jurisdictions in North America, to restrict the use of a non-competition agreement
- The purpose of the restriction is to improve employee mobility and increase the labour pool particularly in the technology sector

Non-Competition Agreements

- New section of the ESA prohibits an employer from entering into a contract with an employee containing a "non-compete agreement"
  - *A "**non-compete agreement**" prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends*

Non-Competition Agreements

- Exceptions:
  - "Executive"
    - *Any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position*

Non-Competition Agreements

- Exceptions:
  - "Sale of Business"
    - if there is a sale or lease of all or part of a business operated as a sole proprietorship or a partnership; and
    - immediately after, the seller is employed by the purchaser; and
    - as part of the sale, the purchaser and seller enter into a non-competition agreement

Non-Competition Agreements

- Any non-competition agreement entered into on or <u>after</u> **October 25, 2021** is void (subject to the exceptions)
- A non-competition agreement entered into <u>before</u> **October 25, 2021** remains in force (subject to any other law that may impact a non-competition agreement)

Non-Competition Agreements

- **<u>IMPORTANT</u>**: The ESA amendment does not prevent an employer from using other restrictive covenants to protect its interests (*e.g.*, a non-solicitation agreement):
  - However, beware of a non-solicitation clause acting as a non-competition agreement
- Have existing agreements reviewed by legal counsel to ensure they are enforceable - *SK can help!*

Electronic Monitoring

Electronic Monitoring

- Ontario is the first jurisdiction in Canada to introduce legislation requiring an employer disclose its electronic monitoring practices
- Government's stated objective is to ensure employees remain "in the driver's seat" and have their privacy interests protected

Electronic Monitoring

- Legislation is particularly significant as many employers have moved to hybrid or remote work arrangements where electronic monitoring may be a component of productivity
  - Key stroke programs
  - Internet tracking programs
  - Computer cameras

Electronic Monitoring

- Effective **October 11, 2022** an employer with 25 or more employees must have a written electronic monitoring policy
- ESA does not define "electronic monitoring"
  - Likely includes GPS on a company vehicle or cell phone, camera, computer program or app to track where and what an employee is viewing or writing

Electronic Monitoring

- The policy must advise employees if they are being monitored electronically
- If they are, the policy must state:
  - How and in what circumstances the employer monitors employees, and
  - The purpose for which information obtained by electronic monitoring may be used by the employer

Electronic Monitoring

- Policy must include the date it was prepared or amended
- Once the policy is prepared, an employer must:
  - Provide a copy to each employee within 30 days of the policy being prepared or amended
  - Provide a copy to a new employee within 30 days of hire
  - Retain a copy of the policy (and any revised versions) for at least three years after the policy ceases to be in effect

Electronic Monitoring

- Employers should consider **now** what electronic monitoring programs they have in place and the impact disclosure may have on the workplace
- Legislation does not restrict or prohibit claims or grievances that may arise once an employee is advised they are being monitored

Electronic Monitoring

- In a non-unionized setting employer has more discretion to engage in surveillance
- In a unionized setting, arbitrators have recognized 'privacy interest' and employer must demonstrate
  - Reasonable basis for surveillance
  - Surveillance is reasonably conducted
  - No less intrusive method to obtain information exists

Electronic Monitoring

***IUOE, Local 793 & LiUNA, Local 183 v. Earth Boring Company Limited*, 2021 CanLII 42419 (ON LA)**

- Union challenged implementation of a phone app used to have employee clock in and out
- Employee required to upload a "selfie" to record time and employee location
- Employer could also use app to track employee location at site

Electronic Monitoring

IUOE, Local 793 & LiUNA, Local 183 v. Earth Boring Company Limited, **2021 CanLII 42419 (ON LA)**

- Arbitrator concluded requirement to use the app was an unjustified intrusion on employee privacy
  - Location tracking could be engaged outside of workplace
  - Data collected would be provided to third party app which had right to hold, use and distribute data

Electronic Monitoring

***Colwell v Cornerstone Properties Inc.*, [2008] OJ No. 5092 (SCJ)**

- Employee quit and alleged constructive dismissal after finding a secret video camera had been installed in her office (and hers alone)
- Boss claimed camera installed due to ‘so-called’ concern about theft by maintenance staff

Electronic Monitoring

***Colwell v Cornerstone Properties Inc.*, [2008] OJ No. 5092 (SCJ)**

- Court: camera not itself unacceptable
  - Implausible explanation rendered conduct unacceptable
- Employee privacy was violated and amounted to constructive dismissal
- Entitled to seven months' pay in *lieu* of notice

Electronic Monitoring

- Discuss policy with legal counsel in advance
  - What are the legal risks associated with monitoring?
  - How can those risks be mitigated?
  - How should the policy be communicated to employees?
- *Contact any member of the SK team!*

Occupational Health and Safety Act

Occupational Health and Safety Act

- Goals of the Occupational Health and Safety Act ("*OHSA*"):
  - Protect the safety of workers in Ontario
  - Set standards by which workplaces will operate safely
  - Impose penalties for unsafe operations/actions
- Quasi- criminal legislation

Occupational Health and Safety Act

- Effective **July 1, 2022,** significant increase to the maximum monetary penalty for an **individual** charged under the *OHSA*:
  - **$1,500,000** for a director or officer of a corporation (increased from $100,000)
  - **$500,000** for all other individuals (increased from $100,000)

Occupational Health and Safety Act

- The result is that a director or officer may now be charged as much as a corporation for a health and safety violation
- This is the second increase to monetary penalties in the past five years
- Potential is even more significant as the maximum penalty is **per offence**

Occupational Health and Safety Act

- The amended maximum penalties apply to offences committed **after** July 1, 2022
  - Will not apply to existing charges or charges laid in relation to an event that occurred prior to July 1
- Reinforces the importance that directors and officers be apprised of and involved in the health and safety matters within their organization - cannot fully delegate liability

Occupational Health and Safety Act

- Effective **July 1, 2022**, the OHSA will prescribe aggravating factors to be considered by courts when deciding the appropriate penalty
  - Many of these factors were already established under existing OHSA case law
- No amendment to expressly incorporate mitigating factors

Occupational Health and Safety Act

- The offence resulted in the death, serious injury or illness
- Recklessness
- Disregarding an inspector's order
- Previous convictions or record of non-compliance with the OHSA
- Lack of remorse
- Moral blameworthiness
- Motivation driven by a desire to increase revenue or decrease costs
- Failure to cooperate or attempts to conceal information

Occupational Health and Safety Act

- Effective **July 1, 2022**, the OHSA limitation period is extended from one to two years
  - Expect charges to be laid later now
- Crucial to conduct a prompt and thorough investigation at the time of occurrence while evidence is available and recollection is fresh
- *SK is a recognized leader in OHS. We can assist.*

Occupational Health and Safety Act

- While not yet in force, additional OHSA amendments have been introduced to address opioid-related workplace incidents
  - Approximately 2,500 opioid-related deaths in Ontario from March 2020 to January 1, 2021
  - 17 overdose deaths of workers in the workplace from 2018 to 2021

Occupational Health and Safety Act

- OHSA will require an employer provide and maintain a naloxone kit if the employer becomes aware or ought reasonably be aware there may be a risk of a worker having an opioid overdose in the workplace

Occupational Health and Safety Act

- Specifically applicable to workplaces with a higher risk of overdose:
  - Nightclubs
  - Bars
  - Construction
  - Workplaces with a history of overdose (*e.g.*, in a region with a higher opioid use rate)

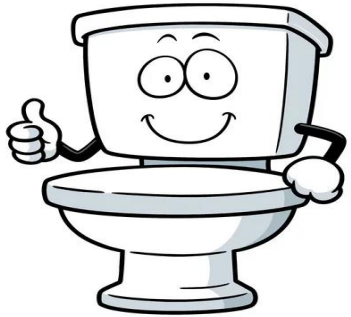
Occupational Health and Safety Act

- An employer must ensure the naloxone kit is in the charge of a worker who:
  - Works in the vicinity of the kit, and
  - Has received training to:
    - Recognize an opioid overdose
    - Administer naloxone
    - Acquaint the worker with hazards related to the administration of naloxone

Occupational Health and Safety Act

- Effective **January 3, 2022**, the owner of a workplace shall ensure access to a washroom is provided to a person dropping off or picking up a delivery from the workplace
  - Does not apply to a personal residence

  (*e.g.*, Amazon driver coming to a home)



The 'Gig' Economy

The 'Gig' Economy

- Effective **July 1, 2022** the *Digital Platform Workers' Rights Act, 2022* ("DPWRA") comes into force
- Ontario will be the first jurisdiction in Canada
- Stand-alone legislation to provide limited rights and protection to workers who perform "digital platform work"

The 'Gig' Economy

- "Digital platform work" does not encompass **all** work engaged through a digital app
- Defined as:

  "the provision of for payment ***ride share, delivery, courier or other prescribed services*** *by workers who are offered work assignments by an operator through the use of a digital platform"*

The 'Gig' Economy

- Key worker rights:
  - To information about
    - How pay is calculated
    - When and how tips are collected
    - The factors used to determine if a work assignment is offered and how those factors are applied
    - Any performance rating system is used, including if there are consequences based on the worker's rating or failure to perform a work assignment

The 'Gig' Economy

- Key worker rights:
  - To a recurring pay period and pay day
  - To minimum wage as set by the ESA for each work assignment performed
  - To amounts earned by the worker including tips and other gratuities

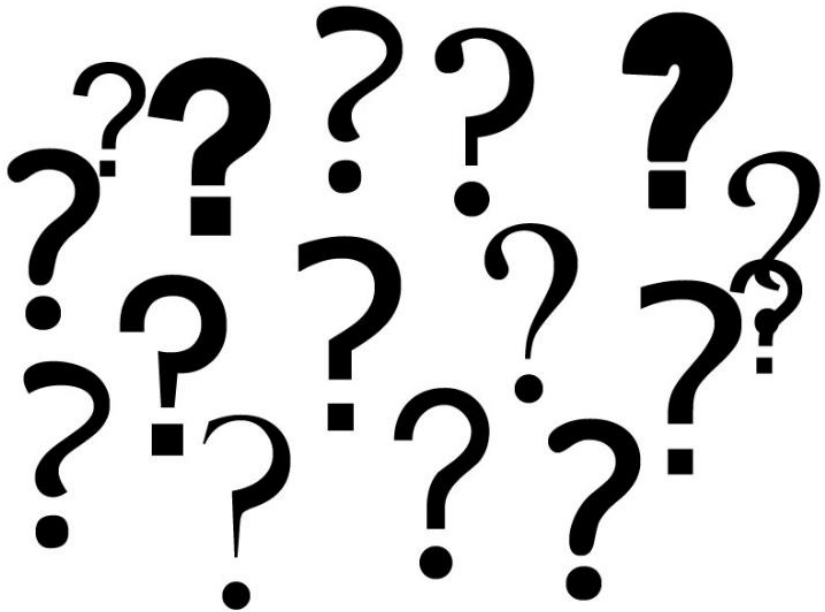
The 'Gig' Economy

- Key worker rights:
  - To resolve digital platform work-related disputes in Ontario
  - To be free from reprisal
  - To notice of removal from an operator's digital platform

The 'Gig' Economy

- Legislation also incorporates administrative provisions related to
  - Record keeping
  - Director liability
  - Complaints and enforcement
  - Collections, offences and prosecution

Questions



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