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# *2023 Year in Review...*

## *And what to expect in 2024*

*The webinar will begin at 9:00 a.m. EST – December 6, 2023*

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# *Agenda*

## ■ **Legislative Update**

- ❑ Licensing requirement for temporary help agencies and recruiters in Ontario
- ❑ Cross-Canada update on key employment-related legislative amendments

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# *Agenda*

- **Trends in Employment and Independent Contractor Agreements**
  - Enforceability of termination provisions
  - Trends in notice periods
  - Independent contractors and the duty to mitigate

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# *Agenda*

## ■ **Labour Law Update**

- Update on Bill 124
- Bargaining update
- Recent COVID-19 decisions

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# *Agenda*

## ■ **Human Rights Update**

- ❑ Role of unconscious bias in race-based discrimination cases
- ❑ Recent case law on workplace investigations
- ❑ Family status discrimination update

# *Legislative Update*



Sherrard Kuzz LLP, Employment & Labour Lawyers

*2023 Year in Review... And what to expect in 2024 - Current as of December 6, 2023*

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# *Legislative Update*

## *Temporary help agency and recruiter licensing*

- Many recent and proposed amendments in 2023
  - ❑ Temporary help agency and recruiter licensing
  - ❑ *Working for Workers Four Act, 2023* (Bill 149)
  - ❑ Proposed prohibition on replacement workers in federal jurisdiction (Bill C-58)
  - ❑ *Pay Transparency Act* (PTA) in British Columbia

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# *Legislative Update*

## *Temporary help agency and recruiter licensing*

- As of **July 1, 2024**, temporary help agency (THA) or recruiter operating in Ontario must have licence to operate
- As of **July 1, 2024**, client-employer cannot use an unlicensed THA
- Failure to comply will violate Ontario *Employment Standards Act, 2000* (ESA)



# *Legislative Update*

## *Temporary help agency and recruiter licensing*

- Deadline was January but extended to July
  - May see regulatory amendments in the interim
- If THA or recruiter has already submitted, no need to reapply
- If submit before July 1, can continue to operate while waiting for approval

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

- Introduced on November 14, 2023
- If passed, will amend various employment-related statutes
  - *ESA, Digital Platform Workers' Rights Act, 2022, Fair Access to Regulated Professions and Compulsory Trades Act, 2006, Workplace Safety and Insurance Act, 1997*
  - See our November 20, 2023 briefing note for all the details!

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

### ■ Job Postings

□ In any publicly advertised job posting, employer or prospective employer will be:

■ Required to include information about expected compensation; and

■ Prohibited from including a requirement related to Canadian experience

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

- Disclosure of artificial intelligence (AI) in hiring
  - If employer or prospective employer uses AI in the hiring process, must include a statement disclosing such use in any publicly advertised job posting
  - First Canadian jurisdiction to require such disclosure
  - Some US jurisdictions have similar requirements

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

### ■ Vacation pay agreements

□ If employee receives vacation pay in any way other than a lump sum prior to the vacation or by direct deposit in the pay period in which the vacation falls, will require written (or electronic) agreement with employee

■ *e.g.*, paid out on each pay cheque or at end of the year

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

### ■ Tips and Gratuities

- ❑ Employer must pay tips and gratuities in the same form as any other wage payment (cash, cheque, direct deposit)
- ❑ Can no longer use digital payment platform which charges a fee to an employee to access tips or gratuities
- ❑ If employer has a tip pool that includes an owner, must post a copy of the policy in the workplace

# *Legislative Update*

## *Working for Workers Four Act, 2023, Bill 149 - Ontario*

- No deduction for cash shortages or lost property
  - If customer of a restaurant, gas station or other establishment leaves the establishment without paying for the goods or services taken from, consumed at or received at the establishment, employee cannot authorize a deduction from wages to compensate

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# *Legislative Update*

## *Bill C-58 – Canada Labour Code*

- Introduced on November 9, 2023
- If passed, will come into force 18 months after Royal Assent
- Significantly impacts ability of federally-regulated employer to use replacement workers during strike or lockout



# *Legislative Update*

## *Bill C-58 – Canada Labour Code*

- Will prohibit federally-regulated employer from using three classes of people to perform bargaining unit work during a strike or lockout:
  - ❑ Employees or managers hired after notice to bargain given
  - ❑ Contractors or employees of another employer
  - ❑ Bargaining unit employees

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# *Legislative Update*

## *Bill C-58– Canada Labour Code*

- Does not restrict an employer from using managers and excluded employees employed prior to the date notice to bargain given
- Prohibits an employee from crossing a picket line and continuing to work, even if they wish to do so

# *Legislative Update*

## *Pay Transparency Act - British Columbia*

- Took effect in May 2023
- Prohibits employer from seeking pay history information about an applicant unless information publicly accessible
  - Includes asking employee directly or seeking to obtain information through a third-party (*e.g.*, recruiter)

# *Legislative Update*

## *Pay Transparency Act - British Columbia*

- Employer cannot reprimand against employee, or threaten to reprimand, because employee has
  - ❑ Made inquiries about their pay
  - ❑ Disclosed pay information to another employee or applicant
  - ❑ Asked employer to comply with PTA
  - ❑ Made a report of non-compliance under PTA

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# *Legislative Update*

## *Pay Transparency Act - British Columbia*

- Employer must prepare pay transparency report by November 1 of each year and publish it on a publicly accessible website maintained by or for employer
- Employer may not reprimand against employee who inquires about the report or information contained in it

# *Legislative Update*

## *Takeaways*

- Bill 149 likely to pass – employers should prepare now
- THAs and recruiters can hold off on registering (for now)
  - Be ready for July 1!
- Federally-regulated employers may use replacement workers in short term, but should start planning now for the future

# *Trends in Employment Law and Independent Contractor Agreements*



# *Trends in Employment Law*

- As discussed at our March 2023 *HReview* webinar, courts almost always interpret agreements in favour of employee
- A termination clause that provides for less than a statutory minimum will be struck down
- We have also seen an increase in reasonable notice awards
  - More than 24 months in ‘exceptional circumstances’ now seems... less exceptional



# *Trends in Employment Law*

- Historically, 24-month cap reserved for executive level
  - Now, salary and ‘nature of employment’ may be less relevant
- Dismissal of older, long service employee with specialized skill attracting higher notice awards
  - Court looks at the likelihood of re-employment
  - Less likely to expect someone close to retirement age to relocate for new job

# *Trends in Employment Law*

## *Milwid v. IBM Canada Ltd., 2023 ONCA 702*

- 62-year-old manager with 38 years service
- Court found ‘exceptional circumstances’ to justify punching past unofficial cap of 24 months
  - Employee’s skills were not transferable; related almost exclusively to IBM products
- Court ordered 27 months’ notice; upheld on appeal

# *Trends in Employment Law*

## *Lynch v. Avaya Canada Corp., 2023 ONCA 696*

- 63-year-old engineer with 38 years service
- Court found ‘exceptional circumstances’ and ordered 30 months’ notice; upheld on appeal
  - Specialized position with skills and experience not easily transferrable to other workplaces
  - Plaintiff ‘key performer’; developed one or two patents a year
  - Similar roles in Ottawa or Toronto; not in Belleville

# *Trends in Employment Law*

## **Takeaways**

- The upward trend in notice awards makes an enforceable, written employment agreement even more important!
- Absent an agreement, experienced counsel can still help mitigate financial impact of dismissing a long-service employee
- Call SK!

# *Independent Contractor Agreements*

- Often for a fixed term
- *What is contractor owed if agreement terminated early?*
- In the employment context (not contractor), if no ‘early termination’ clause, and employer wishes to terminate agreement early, employee is entitled to balance of the fixed term with no duty to mitigate
- Recent decision considered whether this applies to an independent contractor

# *Independent Contractor Agreements*

## *Monterosso v. Metro Freightliner Hamilton Inc., 2023*

### **ONCA 413**

- Fixed term independent contractor agreement of 72 months terminated after 7 months
- Contractor sued for balance of term
- Court held contractor entitled to pay for balance of term with no duty to mitigate (*i.e.*, same as an employee)

# *Independent Contractor Agreements*

## *Monterosso v. Metro Freightliner Hamilton Inc...*

- Court of Appeal disagreed
  - Contractor entitled to balance of term **BUT** has duty to mitigate
    - Less akin to employment relationship; more akin to business transaction in which contract law requires duty to mitigate
- Court decision welcome news, but result may be different if contractor relationship more closely resembles employer/employee (*e.g.*, exclusive)

# *Independent Contractor Agreements*

## *Takeaways*

- Include early termination clause in any fixed term agreement
- Work with SK to ensure your employment and independent contractor agreement language is enforceable!



# *Labour Law Update*



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# *Bill 124 Update*

- Bill 124 received Royal Assent on November 7, 2019
- Wage restraint legislation applicable to public sector employers
  - Imposed cap of 1% per year on compensatory increases for 3-year moderation period

# *Bill 124 Update*

## *Ontario English Catholic Teachers Assoc. et al v. Government of Ontario*

- On November 29, 2022, court struck down Bill 124 as unconstitutional
  - Wage restraint legislation a “substantial interference” with free collective bargaining not saved by section 1 of *Charter*

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# *Bill 124 Update*

## *Ontario English Catholic Teachers Assoc. et al v. Government of Ontario*

- Ontario Government appealed; appeal heard June 2022
- No decision yet... stay tuned!

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# *Bargaining Trends - General*

- Overall increase in union activity
- Continued trend of agreements not being ratified by bargaining unit
- Increase in work stoppages
- External factors continue to impact wage rates

# *Bargaining Trends - Inflation*



# *Bargaining Trends - Low Unemployment*



# ***Bargaining Trends - Wage Increases- National***

- Historical Increases (union and non-union):
  - In 2020, increased to **5.5%**
  - In 2021, increased by **2.7%** (\$0.80)
  - In 2022, increased by **5.1%**
- Current Climate:
  - On a year-over-year basis, average hourly wages rose 4.8% (+\$1.56 to \$34.08) in October 2023



# *Bargaining Trends*

## *Wage Increases- Ontario (Unionized)*

<b>Year</b>	<b>Number of Collective Agreements Sampled</b>	<b>Average Annual Wage Increases</b>
2020	77 private sector agreements	1.7%
2021	66 private sector agreements	1.9% (including 2.3% in Q4)
2022	72 private sector agreements	3.9%
2023	40 private sector agreements	4.2%

# *COVID-19 Caselaw Update*

- While COVID-19 may no longer be the hot workplace issue it was, we continue to see arbitration decisions
- Two decisions in late 2022-2023 of particular significance
  - Mandatory vaccination
  - Religious exemption to vaccination

# *COVID-19 Caselaw Update*

## *Mandatory Vaccination*

### *Lakeridge Health v OPSEU, Local 348, 2023 CanLII 61431*

- First Ontario decision in which arbitrator upheld dismissal of hospital employees for continued refusal to comply with mandatory vaccination policy
- Hospital had instituted policy requiring vaccination as a condition of continued employment, subject to human rights related exemption

# ***COVID-19 Caselaw Update***

## ***Mandatory Vaccination***

### ***Lakeridge Health v OPSEU, Local 348, 2023 CanLII 61431***

- Employees who failed to comply were given additional time to be vaccinated, placed on a leave of absence and ultimately dismissed
- Arbitrator held hospital justified in requiring vaccination and that continued failure to be vaccinated constituted disciplinary misconduct

# ***COVID-19 Caselaw Update***

## ***Mandatory Vaccination***

### ***Lakeridge Health v OPSEU, Local 348, 2023 CanLII 61431***

- Policy reasonable as hospital had obligation to protect health and safety of employees, patients and their families
- Dismissal was appropriate, as failure to have all active employees vaccinated would negatively impact hospital's continued ability to provide health care services to the public

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# ***COVID-19 Caselaw Update***

## ***Mandatory Vaccination***

***BC Rapid Transit Co. v. CUPE, Local 7000, [2022]***

***B.C.C.A.A.A. No. 114***

- Arbitrator allowed grievance of employee placed on leave after he refused to be vaccinated for religious reasons
- Grievor entitled to reasonable accommodation under the *Human Rights Code*

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# *COVID-19 Caselaw Update*

## *Mandatory Vaccination*

*BC Rapid Transit Co. v. CUPE, Local 7000, [2022]*

**B.C.C.A.A.A. No. 114**

- Arbitrator held issue was not whether grievor's religion required that he not be vaccinated, but rather whether his decision not to be vaccinated was based on a sincerely held religious belief

# ***COVID-19 Caselaw Update***

## ***Mandatory Vaccination***

***BC Rapid Transit Co. v. CUPE, Local 7000, [2022]***

***B.C.C.A.A.A. No. 114***

- Decision relies on earlier Supreme Court of Canada jurisprudence that pre-dates vaccination case law
  - Consistent with decisions from earlier in 2022
- Employers should be aware of trend if still addressing religious accommodation requests



# *Human Rights Update*



# *Human Rights Update*

## *Racial Discrimination*

- To establish discrimination (under a protected ground), a claimant must demonstrate
  - They are a member of the protected ground
  - They suffered adverse treatment, and
  - Their protected ground was a factor in the adverse treatment
- In cases of racial discrimination, last point can often be a challenge for a claimant

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# *Human Rights Update*

## *Racial Discrimination*

- Racial discrimination is rarely overt and often established through circumstantial evidence
- In our September 2022 *HReview*, we discussed the role of unconscious bias in racial discrimination
- Case law continued to evolve in 2023

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# *Human Rights Update*

## *Racial Discrimination*

### *Mema v. City of Nanaimo, 2023 BCHRT 91*

- Complainant, who was Black, was CFO of City when his employment was terminated on basis of a report of serious misconduct filed by another City employee
  - Complainant had been using corporate credit card for personal use
  - Not uncommon practice for City employees

# *Human Rights Update*

## *Racial Discrimination*

### *Mema v. City of Nanaimo, 2023 BCHRT 91*

- As credit card balance grew, City spoke with Complainant, cancelled card and arranged repayment plan
- Another staff member was still concerned and filed a misconduct report
  - Report suggested Complainant could not be trusted with the City's finances and posed a risk

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# *Human Rights Update*

## *Racial Discrimination*

### *Mema v. City of Nanaimo, 2023 BCHRT 91*

- Matter went before City Council and Complainant's employment ultimately terminated
- While Complainant's use of company card legitimately raised flags for finance team, Tribunal found race also factored into the decision to terminate

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# *Human Rights Update*

## *Racial Discrimination*

### *Mema v. City of Nanaimo, 2023 BCHRT 91*

- Racial biases ‘woven’ through misconduct report suggesting stereotype that Black men less honest or trustworthy
- Painted Complainant’s conduct in a sinister light
- Assembled partial facts to create a narrative that the Complainant posed a risk to the City

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# *Human Rights Update*

## *Racial Discrimination*

### *Mema v. City of Nanaimo, 2023 BCHRT 91*

- City ordered to pay
  - ❑ \$583,413 in lost compensation
  - ❑ \$50,000 for injury to dignity, feelings and self-respect
  - ❑ \$10,150.04 as compensation for legal expenses



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# *Human Rights Update*

## *Workplace Investigations*

### *Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86*

- Plaintiff a medical resident who filed complaints of workplace and sexual harassment against two doctors
- Defendant was third-party firm retained to investigate complaints
- Investigations conducted under *Occupational Health and Safety Act (OHSA)*

# *Human Rights Update*

## *Workplace Investigations*

### *Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86*

- Investigator issued full report to employer, and two executive summary reports to parties
  - Concluded plaintiff's evidence not credible or reliable; and no workplace or sexual harassment
- Plaintiff sued investigator, alleging conclusions defamatory and should not have been disclosed in report

# *Human Rights Update*

## *Workplace Investigations*

### *Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86*

- Action dismissed
  - ❑ Subject matter of ‘public interest’
  - ❑ Conclusions ‘squarely’ within qualified privilege and as such cannot be considered defamatory
  - ❑ Investigation mandated under OHSA; investigator required by statute to provide findings to employer and parties

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# *Human Rights Update*

## *Workplace Investigations*

### *Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86*

- Court of Appeal agreed; upheld dismissal
- Assurance to internal and external investigators that conclusions, appropriately and reasonably reached, in a statutorily-mandated investigation, ought not expose investigator to liability for defamation

# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

- In *Moore v. British Columbia*, Supreme Court of Canada set out test for discrimination
  - To establish *prima facie* discrimination, employee must demonstrate:
    - They have a characteristic protected from discrimination
    - They experienced an adverse impact
    - The protected characteristic was a factor in adverse impact

# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

- However, with family status discrimination, provinces have not consistently followed *Moore*
  - Alberta and Saskatchewan have, while others have not
- For example, in Ontario, employee must establish a negative impact on a family need that results in ‘real disadvantage’ to the parent/child relationship and the responsibilities that flow from that relationship

# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

- Federally, employee must establish:
  - ❑ Child is under their care and supervision
  - ❑ Childcare obligation engages employee's legal obligation, not personal choice
  - ❑ Employee has made reasonable efforts to meet obligation, with no reasonable alternative solution available
  - ❑ Workplace rule interferes in a non-trivial manner

# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

- British Columbia historically had the most stringent test to establish family status discrimination
- Only made out where complainant could establish a change to a term or condition of employment resulted in serious interference with a substantial parental or other family duty or obligation
- This changed in 2023



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# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

### *British Columbia (Human Rights Tribunal) v. Gibraltar Mines, 2023 BCCA 168*

- Court of Appeal revisited family status discrimination test
- Clarified that an employee would not need to establish there had been a change to a term or condition of employment in order to establish a *prima facie* test
- Court held this aligned BC more closely with *Moore*

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# *Human Rights Update*

## *Test to Establish Family Status Discrimination*

### *British Columbia (Human Rights Tribunal) v. Gibraltar Mines, 2023 BCCA 168*

- Decision will have a significant impact on employers who operate in British Columbia
- Good reminder for employers, particularly if you operate in multiple jurisdictions, to review family status accommodation policies- SK can assist!

# Questions?





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