
Employment Standards Act

~ Common Pitfalls and Best Practices

The webinar will begin at 9:00 a.m. EST – March 4, 2026

Sarah MacKay Marton

smarton@sherrardkuzz.com

416.217.2257

Anja Kohlman Sawa

akohlmansawa@sherrardkuzz.com

416.603.6254

Erin R. Kuzz

erkuzz@sherrardkuzz.com

416.603.6242



Follow @Sherrard Kuzz LLP

250 Yonge Street Suite 3300
Toronto, Ontario M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

Agenda

- 1. Employee Misclassification**
- 2. Remote Work**
- 3. Overtime and Hours of Work**
- 4. Vacation Time and Pay**
- 5. Termination: Wilful Misconduct vs. Just Cause**

Employee Misclassification



Employee Misclassification

- **To whom does the *Employment Standards Act, 2000* (“ESA”) apply?**
 - An “employee” and their employer

- **An employee is a person who:**
 - **Performs work** for an employer for wages
 - Can include an officer of a corporation
 - **Supplies services** to an employer for wages
 - **Receives training** from an employer if the skill being trained is a skill used by the employer’s employees, or
 - Is a **homeworker**

Employee Misclassification

- Employee misclassification is a violation of the ESA and can result in a:
 - Fine
 - Prosecution for an offence
 - Liability for ESA entitlements including overtime, vacation pay, holiday pay, termination pay, *etc.*

- **Onus:** An employee who claims ESA entitlements must prove their employee status

Employee Misclassification

Independent Contractors

- **A *true* independent contractor is not an employee under the ESA**
 - ❑ An independent contractor is in business on their own account

- **Key factors:**
 - ❑ Level of control
 - ❑ Ownership of tools and equipment
 - ❑ Hiring of other workers or helpers
 - ❑ Degree of financial risk and investment
 - ❑ Opportunity for profit

Employee Misclassification

Independent Contractors

■ Indicators of control:

- Right to control **method of work**
- Power to **hire** and control method of hiring
- Right to **suspend or dismiss** the worker
- Payment of **wages**
- Right of employer to demand **exclusive service**
- Right of employer to determine **place of work**
- Degree of **supervision** and freedom in performing task
- Worker's degree of **accountability**

Employee Misclassification

Independent Contractors

Procom Consultants Group Ltd. v Kirti Shringi, 2019 CanLII 45488 (ON LRB)

- Procom was a temporary placement agency working in the IT sector
- Procom worked with its clients to identify project requirements and then place an IT consultant in the client's workplace
- Procom would identify a qualified consultant to do the work and ask if they wished to be retained through their corporation or as a temporary employee
- An incorporated consultant received higher remuneration and was engaged through a consulting agreement

Employee Misclassification

Independent Contractors

Procom Consultants Group Ltd. v Kirti Shringi

- Shringi was hired as a consultant:
 - Required to enter hours through Procom's time tracker system
 - Hours were subject to approval by Procom's client, KPMG
 - Paid by direct deposit based on approved hours
 - Permitted to hire an individual to provide assistance, but only with Procom's and KPMG's approval
 - Worked out of KPMG's office; KPMG provided laptop
- **Shringi was an employee - she was not in business for herself**

Employee Misclassification

Independent Contractors

Rosen v BMO Nesbitt Burns, 2016 ONSC 4752

- Commission-based investment advisors brought a class-action seeking unpaid overtime under the ESA
- Class action included 1,800 employees over a 14-year period
- Employer argued ESA didn't apply because advisors managed their own business
- Case was settled in 2016 for \$12 million after 6.5 years of litigation

Employee Misclassification

Independent Contractors ~ WSIA & OHSA

- **Ontario *Workplace Safety and Insurance Act* (“WSIA”):**
An “independent operator” is not a worker
 - “Independent operator” not automatically insured, but can apply for coverage
 - Workplace Safety and Insurance Board uses an “organizational test” similar to the test under the ESA

- **Ontario *Occupational Health and Safety Act* (“OHSA”):**
A “worker” can include an independent contractor
 - Court of Appeal for Ontario held independent contractor truck drivers were “workers”
 - *Ontario v United Independent Operators Limited*, [2011 ONCA 33](#)

Employee Misclassification

Volunteers

- **A *true* volunteer is not an employee under the ESA**
- Whether or not the person receives remuneration is not determinative
 - ❑ No remuneration does not necessarily mean volunteer
 - ❑ Some remuneration (*e.g.*, honorarium) does not necessarily mean employee
- **Key factors:**
 - ❑ Is the arrangement pursuant to the individual's "pursuit of a livelihood"?
 - ❑ To what extent does the organization receive a benefit?
 - ❑ How was the arrangement initiated?
 - ❑ Is there an economic imbalance?

Employee Misclassification

Volunteers

- **Although a volunteer is not an employee under the ESA...**
 - Volunteer work may be considered “employment” under the Ontario *Human Rights Code*
 - OHSA can apply
 - An organizations has an overall responsibility for the safety of “persons” in the workplace
 - Minimum age requirement for youth under OHSA regulations applies to a volunteer in certain industries
 - A volunteer is not a worker under WSIA
 - Limited exceptions, *e.g.*, volunteer fire or ambulance brigade

Employee Misclassification

Students & Interns

- **Students and interns are generally considered employees**
- However, the ESA excludes certain students from being an employee under the ESA:
 - **Secondary school student** working under a work experience program authorized by their school board
 - **Post-secondary student** working under a program approved by a college or university
- An apprentice is generally considered an employee unless the work they perform is covered by an exclusion
- A student who is not an “employee” under the ESA is still a worker under the OHSA and WSIA

Remote Work



Remote Work

When Does the ESA Apply?

- The ESA applies if the employee's work is performed:
 - In Ontario, or
 - In Ontario and outside Ontario, but the work performed outside Ontario is a continuation of work performed in Ontario

- **Risk:** Remote employee works outside Ontario
 - Does the ESA apply?
 - Does legislation from their remote work location apply?
 - Both?

Remote Work

When Does the ESA Apply?

Jiri Pik v Cure Data Inc., 2025 CanLII 38289 (ON LRB)

- Cure Data Inc. operated in and under the laws of Ontario
- Pik was a citizen of Czechia
- He worked remotely for Cure Data
- He participated in many electronic meetings with colleagues in Ontario but was not physically present in Ontario at any time
- Ontario Labour Relations Board (“OLRB”) held ESA **did not** apply
 - ESA requires employee to have *some degree of physical presence* in Ontario to access statutory employment standards

Remote Work

When Does the ESA Apply?

Shu Zhang v IBM Canada Ltd., 2019 CanLII 79641 (ON LRB)

- Employee hired in 2009 in Ontario and worked in Toronto
- In 2010 began working from home
- In 2015 moved to British Columbia and reported to a manager in the United States
- In 2017 IBM told the employee he was required to relocate back to Ontario to work with a team in Ontario
- He refused to return, and IBM treated this as a resignation
- Employee sought severance pay which is available under the Ontario ESA but not in British Columbia

Remote Work

When Does the ESA Apply?

Shu Zhang v IBM Canada Ltd.

- OLRB held work was performed in British Columbia and not in Ontario – there was no back and forth
- When his employment ceased, the employee had been working in British Columbia for more than two years
- During that time, he did not at any point physically attend to do work in Ontario
- The Ontario ESA did not apply, the employee was not entitled to severance pay

Remote Work

■ **Other risks include:**

- ❑ Remote work can become an implied term of employment; Employee may claim constructive dismissal if asked to end remote work arrangement
- ❑ Ending arrangement may trigger employee complaint with respect to family status or disability
- ❑ Employer has health and safety obligations, even when employee works remotely
- ❑ Work location can impact taxes and payroll

Remote Work

■ **Best practice:**

- ❑ Consider requiring remote work employee to reside in the jurisdiction in which they were hired
- ❑ Carefully consider differences in employment entitlements before allowing an employee to move out of province
- ❑ Formally document remote work location and arrangement
 - If arrangement is temporary, have employee sign acknowledgement
- ❑ If remote work employee may leave province to work, consider tax, health and safety, and workers' compensation obligations

Overtime and Hours of Work



Overtime and Hours of Work

Overtime Threshold

- In Ontario, overtime is generally payable after 44h/week at a rate of 1.5 times the regular rate
 - Some exceptions (*e.g.*, road building (55h), truck driver (60h))
- Overtime varies by province; some provinces have daily and weekly overtime
 - **British Columbia:** Overtime payable at 1.5x after 8h/day or 40h/week and at 2x after 12h/day
 - **Alberta:** Overtime payable at 1.5x after 8h/day or 44h/week
 - **Québec:** Overtime payable at 1.5x after 40h/week
 - **Nova Scotia:** Overtime payable at 1.5x after 48h/week

Overtime and Hours of Work

Who is Entitled to Overtime Pay?

- **An employee (including a salaried employee) is entitled to overtime unless an exception applies – exemptions include:**
 - Certain professionals including a practitioner of architecture, law, professional engineering, public accounting, medicine, dentistry, massage therapy, pharmacy, physiotherapy...
 - And a student in training for these professions
 - Information technology professional
 - Certain salespersons
 - Certain farm employees
 - Superintendent, janitor or landscaper
 - Supervisor or manager

Overtime and Hours of Work

Who is Entitled to Overtime Pay?

- **Exemption:** A person whose work is “*supervisory* or *managerial* in character”
 - ❑ May perform non-supervisory or non-managerial tasks on an *irregular* or *exceptional* basis

- **Key factors:**
 - ❑ Supervise other employees
 - ❑ Hire and fire employees
 - ❑ Responsible for making substantial purchases
 - ❑ Financial control and budgeting
 - ❑ Production planning
 - ❑ Exercise discretion and judgement in management affairs

Overtime and Hours of Work

Supervisory or Managerial Exemption

Glendale Golf and Country Club, Limited v Sanago, **2010 CanLII 4265 (ON LRB)**

- Head Chef was hired to supervise and manage staff
 - Hire, train, performance manage, budget
- Employer did not have sufficient kitchen staff, Head Chef performed line cook work and worked overtime
- Employment Standards Officer (“ESO”) found because Head Chef performed significant line cook work, managerial exception did not apply, and he was entitled to overtime for all overtime hours worked
- Employer appealed to OLRB; appeal allowed in part

Overtime and Hours of Work

Supervisory or Managerial Exemption

Glendale Golf and Country Club, Limited v Sanago

- Managerial exemption applied, but Head Chef entitled to overtime for weeks he worked more than 50% of the time as a line cook
 - Fundamental character of Head Chef position was managerial or supervisory – line cook work done on an exceptional basis
 - However, ESA s. 22(9): If employee performs both exempt and non-exempt work, if non-exempt work is more than half the work performed in a week, employee entitled to overtime for that week
 - There were five work weeks were Head Chef performed line cook work more than half the time
 - He was entitled to overtime for those five weeks

Overtime and Hours of Work

Supervisory or Managerial Exemption

Tsakiris v Deloitte & Touche LLP, 2013 ONSC 4207

- Employee was a “senior manager” in international tax group
- Terminated for cause due to “anomalies” in expense claims
- Employee brought claim for wrongful dismissal and overtime
- Court held he was wrongfully dismissed but not entitled to overtime
- Managerial or supervisory exemption applied
 - Involved in coaching and annual performance reviews of staff
 - Prepared project budget, allocated work, managed work product
 - Prepared final technical memo, opinion, and final bill, subject to partner’s sign off

Overtime and Hours of Work

Overtime Averaging Agreement

- **Averaging Agreement:** Employer pays overtime based on the average hours of work over a period of 2-4 weeks
- Overtime is paid after:
 - ❑ 88 hours over 2 weeks
 - ❑ 132 hours over 3 weeks, or
 - ❑ 176 hours over 4 weeks
- **Example – Two-week averaging agreement in Ontario**
 - ❑ Employee works **36 hours in Week 1; 54 hours in Week 2**
 - ❑ **Without Averaging Agreement: 10 hours overtime**
 - ❑ **With Averaging Agreement: 2 hours overtime**

Overtime and Hours of Work

Overtime Averaging Agreement

■ **Requirements in Ontario**

- Written agreement with employee (*employee cannot unilaterally revoke once signed*)
- Start and end date (*no more than two-year duration*)
- Employee must be paid overtime for time worked in excess of the threshold in the agreement

■ **Requirements vary by province/territory**

- Permit required** in SK, MB, QC, NB, NWT, NVT, YK
- Requirements re scheduling, thresholds, and excessive hours

Overtime and Hours of Work

Time Off In Lieu

- **Time off in lieu:** If employee and employer agree, employee can receive time off at rate of 1.5 h instead of overtime pay
 - ❑ Must be taken within 3 months, or 12 months with employee's agreement
 - ❑ Can be addressed in employment agreement
 - ❑ Banked overtime available in most provinces

Overtime and Hours of Work

What Counts as Hours Worked?

- **Work is deemed to be performed by an employee if:**
 - a) Work is “permitted or suffered to be done” by the employer
 - b) Work was performed by the employee, even if a term of employment limits overtime or requires advanced authorization, OR
 - c) Employee does not perform work but is required to remain at the place of employment
 - i. Waiting or holding themselves ready for work, OR
 - ii. On a rest or break time other than an eating period

Overtime and Hours of Work

What Does Not Count as Hours Worked?

- **Work is not performed by an employee during the time the employee:**
 - a) Is entitled to take time off work:
 - i. For an eating period
 - ii. To engage in their own private affairs, OR
 - b) Is **not at the place of employment** and is waiting or holding themselves ready for call to work

Overtime and Hours of Work

Remote Employees

RBC Insurance Agency Ltd. v Shahzad Ali, 2021 CanLII 44090 (ON LRB)

- Insurance sales advisor compensated *via* base salary, commission, and bonus
- Official hours were 37.5h/week
- Advisor used company laptop and VPN to work remotely outside of his regular working hours
- Never submitted overtime claims but filed complaint after resigning
- Employer argued employee was paid for performance, not time, and it never approved overtime or tracked his hours
- Employer had no records of hours worked

Overtime and Hours of Work

Remote Employees

RBC Insurance Agency Ltd. v Shahzad Ali

- Employer ordered to pay \$164,885.34 in unpaid overtime
- OLRB found employer:
 - Gave employee remote-work tools
 - Had no limits or controls on after-hours work
 - Used commission system that rewarded long-hours
 - Should have known employee was working overtime
- OLRB found employee's self-reported hours were inflated; estimated how much overtime employee worked

Overtime and Hours of Work

Remote Employees

■ **Best practice:**

- Implement written remote work hour limits
- Require overtime pre-approval
- Track and record a remote employee's time worked
- Intervene when there are signs of unauthorized overtime
 - *E.g.*, email timestamps, after-hours system use
- Consider overtime implications when communicating with overtime eligible employees after hours

Overtime and Hours of Work

Three-Hour Rule

- **Three-hour rule applies** if an employee *who regularly works more than three hours a day* is required to present themselves for work but works fewer than three hours, *despite being available to work longer*
 - Applies whether or not it is a regular workday for employee
 - *E.g.*, M-F employee attends a one-hour meeting on Saturday
 - Does not apply to a regularly scheduled < 3-hour shift
 - *E.g.*, a weekly one-hour meeting on Saturday
 - *E.g.*, an employee works 6 hours M/W/F and 2 hours T/R

Overtime and Hours of Work

Three-Hour Rule

- **Entitlement:** Employer must pay wages for three hours equal to the **greater of:**
 - a) Wages equal to employee's regular rate for three hours of work
OR
 - b) The sum of:
 - i. The amount the employee earned for time worked, **and**
 - ii. Wages equal to employee's regular rate for the remainder of the time

Vacation Time and Pay



Vacation Time and Pay

Time vs. Pay

- Under the ESA, vacation **time** and **pay** are separate entitlements; their amount is not always the same
 - **Time** is based on length of service, and accrues during inactive employment (such as a leave)
 - **Pay** is based on “wages earned” (including commissions and bonuses)
 - 4% of wages, if the period of employment is less than 5 years
 - 6% of wages, if the period of employment is 5 years or more

Vacation Time and Pay

Time vs. Pay

■ **Common pitfalls with time vs. pay:**

1. Paid time off does not meet ESA requirement for 4% or 6% of “wages” (*e.g.*, variable compensation)
2. Employee receives sufficient vacation pay but not time (*e.g.*, employer pays out for untaken vacation time)
3. Employee does not receive accrued vacation time (*e.g.*, during a statutory leave)

Vacation Time and Pay

Calculating Vacation Pay

- **Vacation pay:** Percentage of “wages” (*excluding vacation pay*)
- **Wages includes:**
 - ❑ **Overtime and premium pay**
 - ❑ **Commission**
 - ❑ **Bonus** (*if bonus is related to hours of work, production, or efficiency of the worker – even if it’s otherwise discretionary*)
 - ❑ **Profit sharing** (*if it is non-discretionary*)
 - ❑ **Prize** (*to incentivise employees, such as a sales contest*)
 - ❑ **Termination pay**
- **Wages does not include:**
 - ❑ Tip, gift, travelling or other expense
 - ❑ Severance pay under the ESA

Vacation Time and Pay

Calculating Vacation Pay

Singh v RBC Insurance Agency Ltd., 2023 ONSC 1439

- Insurance advisors earned salary and variable compensation
- Compensation policy said all variable compensation established at a level that included vacation pay
- Advisors brought \$80 million class action – issue was whether the policy violated the ESA
- Class action was certified – there was a basis in fact for the plaintiff’s theory the defendant’s approach breached the ESA
- Motion for leave to appeal dismissed (2024 ONSC 2836)

Vacation Time and Pay

Exceeding ESA Entitlements

- If providing vacation entitlement in excess of ESA, be careful to avoid giving more than bargained for
- Example: Vacation policy grants 5 weeks of “paid vacation”
 - **Risk:** Employee will seek vacation pay of 10% on ESA “wages” vs. base pay
 - **Risk:** Employee will argue they’re entitled to full paid vacation even while on leave for part of the year

Vacation Time and Pay

Exceeding ESA Entitlements

- Unambiguous ESA compliant language will reduce risk:
 - *You will receive 5 weeks of vacation time and vacation pay of 10% of your base wages, or, your minimum vacation pay entitlements under the ESA, whichever is greater*
 - *The Company will perform an annual reconciliation to ensure you receive at least your minimum entitlement to vacation pay under the ESA*

Vacation Time and Pay

Exceeding ESA Entitlements

Ashenurst Nouwens & Associates Inc. v Charles McFarland, 2016 CanLII 44014 (OLRB)

- Employment agreement provided for “4 weeks of vacation per year”
- ESO awarded vacation pay based on 8% of total wages
- Employer argued employee should receive ESA minimum vacation pay because agreement silent on amount of vacation pay
- OLRB disagreed
 - Since employer promised employee twice the statutory minimum of vacation time, it “stood to reason” employer was obligated to pay twice the statutory minimum in vacation pay

Vacation Time and Pay

Vacation Scheduling and Carry-Over

- ESA requires vacation time be taken not later than ten months after the end of the year in which it accrued
- Many employers allow employees to:
 - Take vacation before it is accrued or in the year it is accrued, and/or
 - Carry over vacation for some longer period of time
- **Common pitfalls:**
 - “Use it or lose it” policy which does not comply with the ESA
 - Failure to ensure an employee who carries over vacation time takes sufficient time in a year to comply with the ESA
 - Vacation bank which accumulates increasing financial liability

Vacation Time and Pay

Vacation Scheduling and Carry-Over

■ **Best practice:**

- ❑ If implementing a “use it or lose it” policy, carve out ESA entitlements (*employee cannot “lose” their ESA entitlements*)
- ❑ Limit the amount of vacation which can be carried over
- ❑ Require employee to schedule ESA minimum vacation time (*monitor this, unilaterally schedule if needed*)
- ❑ Secure written agreement to deduct excess vacation pay upon departure from employment (*if employee permitted to take vacation before it is accrued*)

Wilful Misconduct vs. Just Cause



Wilful Misconduct vs. Just Cause

- At common law, employer can terminate without notice or pay in lieu for “**just cause**”
- Under the ESA, an employer can terminate without paying termination or severance pay if:
 - An employee is guilty of “**wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer**”
- An employee may be disentitled to common law notice but still entitled to ESA minimum entitlements
 - Just cause is already a high bar; the ESA standard is even higher...

Wilful Misconduct vs. Just Cause

Render v ThyssenKrupp Elevator Ltd., 2022 ONCA 310

- Court of Appeal held a single incident of sexual harassment was just cause but not wilful misconduct
- Plaintiff employee was in a managerial role – he slapped a female coworker on the buttocks
- **Just cause** established because:
 - Given the seriousness of the conduct, employer could not condone or be seen to condone employee's action
 - Plaintiff was a manager and responsible for implementing workplace anti-harassment policy
- Court of Appeal found no **wilful misconduct** because:
 - The conduct was not pre-planned and was done “in the heat of the moment in reaction to a slight”

Wilful Misconduct vs. Just Cause

■ What is wilful misconduct?

- Key element is wilfulness

- Generally, means employee intended the result

- However, recklessness can meet the standard if employee knew or ought to have known their conduct would cause the result

- Misconduct cannot be trivial or condoned by employer

■ Examples where wilful misconduct threshold was met:

- Theft of cash or property

- Falsifying time sheets

- Alcohol use during work hours (*but consider human rights*)

Wilful Misconduct vs. Just Cause

- **Failure to follow company policy or rule can amount to wilful misconduct or disobedience, if:**
 - The policy or rule violated:
 - Was clear and unequivocal
 - Had a substantial bearing on the employment relationship
 - Concerned an important subject matter
 - Was communicated to the employee, and
 - The employee knew (*or ought to have known*) in advance the conduct could result in termination

Wilful Misconduct vs. Just Cause

Cross-Canada

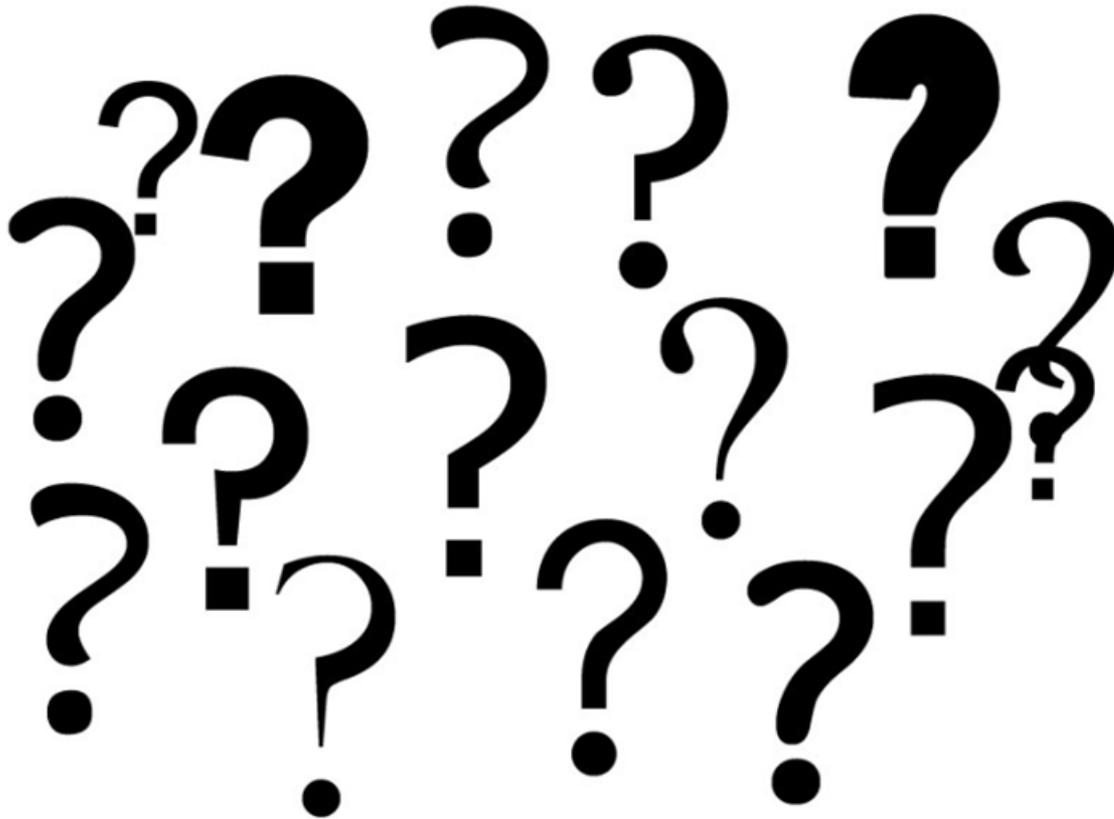
- Ontario is not the only province with a statutory standard...
 - **Nova Scotia** – “wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer”
 - **Newfoundland and Labrador** – “wilfully refused to obey a lawful instruction of the employer, or has committed misconduct or been so neglectful of duty that the interest of the employer is adversely affected, or has otherwise been in breach of a material condition of the contract of service”
 - **Québec** – “committed a serious fault”

Key Takeaways

- Regularly review policies, handbook and employment agreements
- Audit worker classification under ESA, OHSA and WSIA
- Document remote working arrangements and hours of work
- Consider employee's overtime eligibility and averaging agreement to manage costs
- Audit vacation policy and practices

Sherrard Kuzz LLP is happy to assist!

Questions?





Sarah MacKay Marton
smarton@sherrardkuzz.com
416.217.2257



Erin R. Kuzz
erkuzz@sherrardkuzz.com
416.603.6242



Anja Kohlman Sawa
akohlmansawa@sherrardkuzz.com
416.603.6254



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