



Employment Law Solutions for the Canadian Workplace

RELEASE 165 – APRIL 2022

new and noteworthy

- **Employment Law Basics:** The entire content of Tab I, Employment Law: The Basics, has been reviewed to ensure that the content is current. Numerous discussions of relevant recent cases have been added, and other updates to the text have been provided as needed.

highlights of this release

- **Tab I-1.B The Rules: Rights and Obligations of Employees and Employers:**
 - Section I.1.B.1, The Common Law, has been updated to include a discussion of the ruling in *Waksdale v. Swegon North America Inc.*, regarding the effect of illegal provisions in a “for cause” termination clause in an employment contract.
- **Tab I-1.C The Players: Employee and Employer:**
 - Section I.1.C.6, The Employer, has been updated with a discussion of common control as the determining factor establishing whether two entities are common employers. A review of the case of *Novaquest Finishing Inc. v. Abdoulrab* has been added to illustrate this principle in the context of the insolvency of one entity.
- **Tab I-2.A The Selection Process:**
 - In Section I.2.A.2.3, The Interview: Statutory and Common Law Considerations—Negligent Representation, the case of *Fraser v. Canerector Inc.* has been added to show a circumstance in which employer remarks in a job interview did not rise to the level of a “contractual term or representation.”
- **Tab I-2.C The Employment Contract:**
 - In Section I.2.C.2.3, Written Contracts: Some Standard Terms—Termination, the case of *Waksdale v. Swegon North America Inc.* has again been noted to illustrate that if a “just cause” clause is not carefully drafted in conformity with employment standards legislation, a companion “without cause” clause may be voided.

release notes

please review

- Section I.2.C.3.3, Restrictive Covenants: Non-Competition, Non-Solicitation, and Confidentiality Covenants or Agreements—Non-Competition Covenants, has been updated to note that Ontario has enacted legislation prohibiting non-competition agreements for most employees.
- **Tab I-3.B Policy Manuals, Procedures, and Workplace Rules:**
 - Section I.3.B.4, Policies in Practice, has been updated to note that a breach of policy that is not sufficiently severe or injurious to the employment relationship will not warrant dismissal, and that courts have been increasingly reluctant to find just cause for termination.
- **Tab I-3.C Performance Reviews and Evaluations:**
 - Section I.3.C.4, The Substantive Requirements, has been updated with a discussion, citing *Czerniawski v. Corma Inc.*, of the importance of providing the employee with opportunity for improvement that is proportionate to overall tenure and performance.
- **Tab I-3.D Considerations on Discipline or Promotion of Employees:**
 - In Section I.3.D.8, Suspension as a Disciplinary Measure, a discussion citing *Humphrey v. Mene* has been added to highlight the potentially serious consequences of placing an employee on a disciplinary suspension in bad faith.
- **Tab I-3.E Privacy in the Workplace: Monitoring, Surveillance, and Testing:**
 - Section I.3.E.3, The Employer’s Right to Information, has been updated with a discussion, citing several cases, of employee privacy in the context of mandatory vaccination policies during the COVID-19 pandemic.
- **Tab I-3.F Condonation:**
 - Section I.3.F.1, The Basics, has been updated with a discussion of *Mack v. Universal Dental Laboratories Ltd*, illustrating that even serious misconduct can be deemed condoned by an employer who had not chosen to engage the disciplinary process or raise the behaviours at any formal meeting.
- **Tab I-4.A Resignation:**
 - Section I.4.A.2, The Elements of a Valid and Enforceable Resignation, has been updated with further details on what an employer must do to communicate acceptance of a resignation and actions that are consistent with the acceptance. Citations of recent cases have been added.
 - Section I.4.A.3, The Requirement of Clear and Unambiguous Language, has been updated with a discussion of when an employee’s commencement of a legal action may constitute resignation, reviewing the case of *Suleman v. British Columbia Research Council* and citing others. Also, a discussion of the case of *Avalon Ford Sales (1996) Limited v. Evans* has been added to illustrate circumstances in which an employee who resigns during an emotional outburst should be given time to resile from the resignation. Further, the case of *Kerr v. Valley Volkswagen* is discussed to illustrate when an employer may legitimately accept an employee’s conditional resignation—in this case, the employee said he would quit if his pay was not increased.

- Section I.4.A.4, The Employee's Requirement to Provide Reasonable Notice, has been updated to note that Quebec and Saskatchewan have been added to the list of provinces in which the employee's obligation to give notice of resignation is governed by employment standards legislation; further details are provided on circumstances in which notice is required and the jurisdictions in which notice must be in writing. Also, a discussion, citing cases, has been added of employers' right to claim damages if fiduciary employees fail to give reasonable notice.

● **Tab I-4.B Retirement:**

- Section I.4.B.2, Retirement at Common Law, has been updated with discussions of cases considering when mandatory retirement can be enforced in accordance with policy, and when, in the absence of an agreement, mandatory retirement constitutes wrongful dismissal. Also, discussion of the following cases has been added: *Jardine v. Gloucester (City)*, to illustrate that an employee's notice of retirement should be clear and unequivocal to be deemed effective; *English v. Manulife Financial Corporation* to illustrate when a notice of retirement should be considered conditional; and *Dawe v. The Equitable Life Insurance Company of Canada* to show that upcoming retirement should not be a factor in determining the reasonable notice period.

● **Tab I-4.C Sale of Employer's Business:**

- In Section I.4.C.5, Recognition of Past Service: An Implied Term of the Employment Relationship?, a detailed discussion of the case of *Celestini v. Shoplogix Inc.* has been added to illustrate when a changed substratum of employment conditions may be an exception to implied continuity of employment.

● **Tab I-4.D Insolvency of the Employer:**

- In Section I.4.D.1.3, Bankruptcy and Receivership—Priority of Employee Claims in a Bankruptcy or Receivership, a discussion has been added detailing the liability, under federal and Ontario legislation, of an insolvent company's directors for up to six months' of unpaid employee wages.

● **Tab I-4.E Constructive Dismissal:**

- In Section I.4.E.3, Fundamental/Substantial Changes in Terms of Employment, a discussion has been added of the difference between "fundamental" and "substantial" breaches, as stated by the Supreme Court in *Potter v. New Brunswick Legal Aid Services Commission*.
- In Section I.4.E.4.3, Grounds of Constructive Dismissal—Geographic Relocation, a discussion of *Reynolds v. Innopac Inc.* has been added, to illustrate when a required move to another city and province may constitute constructive dismissal.
- In Section I.4.E.4.4, Grounds of Constructive Dismissal—Cessation of Employment, a substantial new discussion has been added to describe the effects of *Ontario Regulation 228/20*, concerning reduced or lost pay or hours for reasons related to COVID-19, and conflicting court rulings regarding when these circumstances constitute constructive dismissal.
- A new Section I.4.E.4.7, Grounds of Constructive Dismissal—Reduction in Compensation, has been added, to show what percentage of wage reduction, either alone or combined with other factors, may constitute constructive dismissal.

release notes

please review

● **Tab I-4.G Frustration of Contract:**

- In Section I.4.G.1, Introduction, a discussion has been added of *Drimba Estate v. Dick Engineering Inc.*, to show that where frustration of contract is due to illness or injury, the employer remains obliged to provide both termination pay and severance pay.
- In Section I.4.G.2.1, Grounds for Frustration at Common Law—Employee Illness, the discussion of an employee’s reasonable likelihood to return to work has been updated and expanded, citing additional cases. Also, the case of *McLean v. Miramichi (City)* has been noted to illustrate that where a disability is work-related, the employer may need to extend the time frame during which an employee is entitled to return to work.
- Section I.4.G.2.3, Grounds for Frustration at Common Law—Change in Business Circumstance, has been updated with a discussion of recent cases involving circumstances related to the COVID-19 pandemic.

● **Tab I-5.A Damages for Wrongful Dismissal:**

- Section I.5.A.1.2, Reasonable Notice—Determination of the Common Law Notice Period, has been updated to note the case of *Currie v. Nylene Canada Inc.*, in which the Ontario Superior Court awarded 26 months’ salary in lieu of notice to an employee who had worked for her employer for 39 years.

● **Tab I-5.B Mental Distress and Aggravated/Punitive Damages:**

- In Section I.5.B.2, Punitive Damages, a discussion of *Galea v. Wal-Mart Canada Corp.* has been added to illustrate when an employer may be liable for bad faith damages, amounting in this case to \$250,000 in moral damages and \$500,000 in punitive damages. The case of *Enyon v. Simplicity Air Ltd* is also noted, in which punitive damages were upheld for an injured employee who did not receive safety training and whose supervisor’s behaviour after the injury was reprehensible.
- Section I.5.B.3, Aggravated Damages, has been updated with a discussion of *Russell v. The Brick Warehouse*, in which aggravated damages of \$25,000 were awarded because the employer’s termination letter was not compliant with the minimum entitlements of Ontario’s *Employment Standards Act, 2000*, and also did not indicate that the employee would receive his minimum entitlements if he declined the offer.

● **Tab I-5.D Tort Liability:**

- Section I.5.D.5, Interference with Contractual Relations, has been updated with a discussion of the Supreme Court case of *C.M. Callow Inc. v. Zollinger*, which examines questions of positive obligations of disclosure, and the obligation to correct false impressions created by a party’s own actions.

● **Tab I-5.E Injunctive Remedies:**

- Section I.5.E.1, Introduction, has been updated with a discussion of Ontario’s new *Working for Workers Act*, which includes a prohibition on the use of non-compete agreements, except in the context of the sale of a business or for “executive” positions.

- **Tab I-6.B Steps in the Litigation Process:**

- Section I.6.B.1.1, Pleadings—Statement of Claim, has been updated to include a clarification about circumstances in which aggravated and punitive damages may be claimed.
- Section I.6.B.1.2, Pleadings—Statement of Defence, has been reviewed and updated with several clarifications, including regarding the consequences of breaching the duty of good faith and fair dealing.

- **Tab I-6.D Settlement and Release:**

- The suggested points to consider in drafting a final release have been reviewed and updated. Also, a discussion has been added regarding considerations when an employer's workplace is subject to federal jurisdiction, in particular under the *Canada Labour Code* and its prohibition against unjust dismissal.



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