

Human Resources Management in Challenging Times:

Pandemic Edition

Overholt Law LLP Inaugural Webinar
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Welcome to Overholt Law LLP!

- Formed January 1, 2021
- Firm Composition:
 - Partners:
 - Carman J. Overholt, Q.C.
 - Preston I.A.D. Parsons
 - Jennifer S. Kwok
 - Associate Counsel: Brent Mullin
 - Associates:
 - Kai Ying Chieh
 - Mohit Chhibber
 - Articling Student: Gurpreet Gill
 - TBA: More coming soon!



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Overview

- 1) New case law
- 2) Workers' Compensation Issues
- 3) *Employment Standards Act* Issues

....all arising out of the COVID-19 Pandemic



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1) New Case Law



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Human Rights - Labour

United Steelworkers, Local 2251 v. Algoma Steel Inc., 2020
CanLII 48250 (ON LA)

- Arbitrator held it was unreasonable for the grievor to make a choice between maintaining access to his children or continuing to work.
- Arbitrator held the employer's policy was discriminatory on the basis of family status.



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Labour Relations

- Recent arbitration cases arising in unionized workplaces indicate how seriously labour adjudicators are taking an employer's duty to comply with COVID-19 protocols.
- In two recent cases, arbitrators have upheld an employer's right to terminate employees who fail to comply with COVID-19 workplace procedures.
- In another, an arbitrator upheld the employer's right to implement a COVID-19 testing policy.



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Labour Relations

- ***Garda Security Screening Inc. -and-. IAM, District 140, [2020] O.L.A.A. No. 162 (Arbitrator Brian Keller)***
 - Employer informed all employees of public health guidelines, requiring all employees awaiting COVID-19 lab tests to self-isolate
 - Grievor was an Airport Security Screening Officer
 - Obtained COVID-19 test, then came to work same day because she “did not feel sick”
 - Grievor tested positive, then lied to employer that she attended work instead of isolating
 - Grievor claimed unaware of self-isolation need
 - Terminated for just cause



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Labour Relations

- *Garda Security Screening Inc. -and-. IAM, District 140, [2020] O.L.A.A. No. 162 (Arbitrator Brian Keller)*
 - Union and Employer acknowledge all employees were aware of requirement
 - Arbitrator found grievor's denial of same as incredulous, and her lack of remorse or concern about potential consequences "troubling"
 - Grievance dismissed; termination for just cause upheld



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Labour Relations

- ***LIUNA, Ontario Provincial District Council -and- Aecon Industrial, 2020 CanLII 91950 (Arbitrator Joseph Carrier)***
 - Employer policy prohibited attendance at work with symptoms of COVID-19
 - Grievor attended anyways and demonstrated dishonesty, insubordination, lack of care about possible exposure to co-workers, and had a prior record of safety violations (with associated discipline)
 - Terminated for just cause; upheld



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Labour Relations

- ***Caressant Care Nursing & Retirement Homes -and- CLAC, 2020 CanLII 100531 (Arbitrator Dana Randall)***
 - Employer operated an elderly care home
 - Unilaterally instituted mandatory COVID-19 testing policy
 - Policy determined to be reasonable in all the circumstances



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Labour Relations – one more for good measure

- *British Columbia Ferry Services Inc. v British Columbia Ferry and Marine Workers Union*, 2020 CanLII 89913 (BC LA)
 - Temporary layoff of hundreds of employees on April 3, 2020 due to pandemic
 - Decision analyzes the Collective Agreement at issue and the scope of the management rights clause, as well as considered s. 54 of the *Labour Relations Code*
 - Exceptions to s. 54's 60 day notice requirement are rare
 - “*The circumstances represent the epitome of an “exception”*”



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Wrongful Dismissal – Reasonable Notice

- *Mohammed v. Dexterra Integrated Facilities Management*, 2020 BCSC 2008
 - 51 year old Cleaning Supervisor with grade 12 education and 1.5 years of service awarded 5 months in lieu of notice
 - Mr. Mohammed's employment ended November 11, 2019 after 4 weeks' working notice



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Wrongful Dismissal – Reasonable Notice

- The Court noted:
 - *“economic factors at the time of termination may be a factor, although they are not to attract undue influence... Those arising post-termination, **such as those from the COVID-19 pandemic**, can be relevant to mitigation if they impact the availability of equivalent employment”* (see para 27, cites removed)
 - *“Mr. Mohammed’s unchallenged evidence establishes that he made efforts to find employment in his field since losing his job with Alpine. His evidence that the COVID-19 pandemic has negatively affected his ability to find work is also unchallenged. Dexterra has not proven that Mr. Mohammed has failed to act reasonably to look for alternate employment.”* (para 55)



2) Workers' Compensation Issues



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Employer Workplace Obligations

- Employers, workers, owners, prime contractors, and other people at the workplace all have a responsibility to prevent exposure to COVID-19 in the workplace
 - **Employers** are responsible for having a system in place to identify the hazards of COVID-19, control the risk, and monitor the effectiveness of the controls
 - **Workers** are responsible for taking reasonable care to protect their own health and safety and the health and safety of other people at workplace – this includes frequent hand washing and staying home when sick
 - **Contractors**



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Employer Workplace Obligations

- All BC employers are required to have a safety plan that outlines the policies, guidelines and procedures put in place to reduce the risk of COVID-19 transmission
- The plan must be posted at the worksite and on the employer's website, if there is one
- Employers must also review and update their plans if conditions change or in response to Provincial Health Officer orders.



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COVID-19 Safety Plans

- The plan needs to address the risks specific to your workplace
- Employers can meet their responsibility to develop a Safety Plan for their workplace by taking the following steps:
 - Assess the tasks carried out in the workplace and identify where the risk of transmission may arise while performing those tasks
 - Put controls in place to eliminate or minimize the risk of transmission
 - Develop the Safety Plan in consultation with workers
 - Communicate the Safety Plan to everyone in the workplace
 - Train workers and supervisors to know their responsibilities and rights
 - Ensure the Safety Plan is being followed in a fair, consistent way
 - Update and re-post the Safety Plan



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COVID-19 Safety Plans

- Review the industry-specific protocols that apply to your industry
- Policies must prohibit workers and others from entering the workplace under specific circumstances:
 - Anyone who has symptoms of COVID-19
 - Anyone who has travelled outside of Canada within the last 14 days
 - Anyone who has been identified by Public Health as a close contact of someone with COVID-19
 - Anyone who has been told to isolate by Public Health



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Worker Claims

- When a worker contracts COVID-19 as a direct result of their employment, they are entitled to compensation if the following conditions are met:
 - there is evidence that the worker has contracted COVID-19; and
 - the nature of the worker's employment created a risk of contracting the disease significantly greater than the ordinary exposure risk of the public at large.

Claims submitted for COVID-19 contracted through a work-related exposure are adjudicated on a case-by-case basis



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Claims Data

- Current to January 15, 2021 – TOTAL 3,272
 - Total allowed – 1,558
 - Total disallowed – 923
- Highest industry of claims:
 - Health care and social services – 1,150 allowed claims
 - Long-Term care – 802 registered claims
 - Acute care – 752 registered claims
 - Service – Education – 65 allowed claims
 - Agriculture - 76 allowed claims



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Return to Work during COVID-19 - FAQ

- Coverage for people in quarantine or self-isolation
- Workplace shut-down for employees on modified duties
- Injured employee on GRTW must quarantine or self-isolate
- Employee is recovered but no work is available due to COVID
- Employee is recovered but must quarantine or self-isolate
- Relief of costs to employers during COVID-19 pandemic for inability of workers to seek treatment



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Concerns about COVID-19 at work

- A generalized concern is not a sufficient reason not to return to work
- Workers have the right to refuse work if they believe it presents an undue hazard
 - An undue hazard is an “unwarranted, inappropriate, excessive, or disproportionate” hazard. For COVID-19, an “undue hazard” would be one where a worker’s job role places them at increased risk of exposure and adequate controls are not in place to protect them from that exposure



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Canada Labour Code and COVID-19

- As applicable to federal employees
- COVID-19 constitutes a workplace hazard under the CLC
- An employer can request employees provide information to the extent that it directly relates to ensuring the health and safety of employees in the workplace
 - If exhibiting symptoms, for the result of the testing and if they were present in the workplace at the time
 - If they have travelled internationally
 - If they have been directed by PHA to isolate



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COVID-19 Diagnosis Messaging

- If an employee is diagnosed with COVID-19 in the workplace what does the employer do?
- Unless there is a demonstrated need to identify the person based on public health official's advice, it should normally be sufficient for health and safety purposes to state that an (unnamed) person was in the workplace, and that this person was infected, exhibited symptoms, or had been exposed to the virus.
- The focus should be on applying infection containment protocols.
- These are guidelines and should be adapted to the workplace reality of each organization



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COVID and Mental Health

- The COVID-19 pandemic affects most people at both work and home, which can take a toll on mental health. Some common reactions include feeling helpless, overwhelmed, lonely, or afraid for your health or the health of loved ones
- WorkSafeBC has a Guide for Workers that suggests healthy strategies to manage stress and anxiety, with a focus on supporting mental health and well-being of self and others
 - Includes simple conversation starters when talking to co-workers who may be overwhelmed
 - Mental health resources



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Words of Wisdom

**"Wash your hands like you've
been chopping jalapeños
and you need to change
your contacts."**

~ Dr. Bonnie Henry



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3) *Employment Standards Act* Issues



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Recap: COVID-19 Amendments

- *Employment Standards Act*, RSBC 1996, c 113 (the “Act”)
- Key Spring 2020 amendments in response to COVID-19:
 - Section 49.1 – new illness or injury leave (*permanent amendment*)
 - Section 52.12 – COVID-19-related leave (*temporary amendment*)
 - *Employment Standards Regulation*, section 45.01 – COVID-19-related temporary layoff extensions (*temporary amendment*)



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COVID-19 Leave

52.12 (2) **An employee who requests leave under this section is entitled to unpaid leave** for the period described in subsection (3) if, in relation to COVID-19, any of the following applies:

- (a) the employee **has been diagnosed with COVID-19** and is acting in accordance with (i) instructions or an order of a medical health officer, or (ii) advice of a medical practitioner, nurse practitioner or registered nurse;
- (b) the employee is in **quarantine or self-isolation** in accordance with (i) an order of the provincial health officer, (ii) an order made under the Quarantine Act (Canada), (iii) guidelines of the British Columbia Centre for Disease Control, or (iv) guidelines of the Public Health Agency of Canada;
- (c) the employer, due to the employer's concern about the employee's exposure to others, has **directed the employee not to work**;
- (d) the employee is providing **care to an eligible person**, including because of the closure of a school or daycare or similar facility;
- (e) the employee is outside the province and **cannot return to British Columbia** because of travel or border restrictions;
- (f) a prescribed situation exists relating to the employee.



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COVID-19 Leave

(3) An employee is entitled to leave under this section for **as long as a circumstance described in subsection (2) applies** to the employee.

(4) If requested by the employer, the employee must, as soon as practicable, provide to the employer **reasonably sufficient proof** that a circumstance described in subsection (2) applies to the employee.

(5) An employer **must not request, and an employee is not required to provide,** a note from a medical practitioner, nurse practitioner or registered nurse for the purposes of subsection (4).

(6) This section may be repealed by order of the Lieutenant Governor in Council.



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COVID-19 Leave

- What happens while an employee is on COVID-19 leave?
 - Employer must not terminate employment or change a condition of employment without the employee's written consent (section 54(2))
 - Service is deemed to be continuous for annual vacation entitlements, individual or group termination entitlements, and pension, medical or other benefits plans (section 56(1))
 - If employer pays for benefits plans, or if the cost is split and the employee continues to pay their portion, the employer must continue to make payments (section 56(3))



COVID-19 Temporary Layoffs

- The *Act* anticipates “temporary layoffs” as being possible for up to 13 weeks in a consecutive 20-week period, after which the layoff is deemed to be a termination of employment
- The BC Government amended the *Regulation* to increase the maximum period for a temporary layoff due in whole or in part to the “COVID-19 Emergency”
 - May 2020 – extended to 16 weeks in 20-week period
 - June 2020 – extended to 24 weeks in 28-week period ending on or before August 30, 2020
(only for layoffs commencing before June 1)



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COVID-19 Temporary Layoffs

- As of August 30, 2020, no further extensions to temporary layoff period
- Employers requiring a temporary layoff beyond 13 weeks in a 20-week period must now apply to the ESB for a variance under section 72(a)
 - Must show that at least 51% of affected employees support the extension of the layoff period
 - Applications considered on case-by-case basis



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Decisions re: COVID-19 Issues

- Not many cases available to determine how the ESB/EST are dealing with specific COVID-19 issues
 - Branch decisions are a) backlogged and b) hard to track down for public review
 - Fewer than 10 Tribunal decisions referencing COVID-19, and none dealing strictly with COVID-19 leaves or any complaints by employees involving COVID-19
 - We may see more decisions in the coming months dealing with COVID-19 issues



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Decisions re: COVID-19 Issues

- One takeaway from Tribunal decisions that *are* available – COVID-19 being used by some employers as an attempted justification for delay
 - Late filing of an appeal to the Tribunal: *Canbridge Business Group Ltd.*, 2020 BCEST 138
 - Late renewal of licence to operate employment agency: *Simply Recruiting Inc.*, 2020 BCEST 120
- Employers should not rely on this argument!



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Enforcement of the *Act*

- An employee can file an ESB complaint against an employer for a contravention of the *Act* (section 74)
- The ESB also has the power to conduct an investigation to ensure compliance whether or not it has received a complaint (section 75)
- Range of remedies/penalties available
 - Reinstatement and compensation for lost wages or expenses due to contravention of leave provisions (section 79)
 - Administrative penalties (section 98)



Questions?

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