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# Hot Topics in Canadian Employment Law: A Coast-to-Coast Review

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# Presenters

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## Presenters

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## Speakers



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## Culpable and Innocent Absences

- First and most important distinction in dealing with attendance issues
  - Culpable: lateness or absences for which the employee should be held responsible because the problems are within the employee's power to address and correct
  - Non-culpable: absences that are beyond an employee's control and are not his/her fault



## Goals of Managing Absenteeism

- **FACILITATE** the early, regular and safe return to work
- **LAWFULLY** remove from an employee employment who cannot return to work in the foreseeable future
- **DISCIPLINE** the employee who is absent without a legitimate medical reason



## Attendance Incentive Programs

### Carrot v. stick

- Examples of incentives to attend:
  - Cash out of unused paid sick leave annually, or on retirement or death
  - Pay rewards for "superior" or "perfect" attendance
  - Draw for a truck!





## Attendance Incentive Programs

### Carrot v. stick

- Examples of incentives to attend:
  - Floater days as reward for excellent attendance.
  - Attendance as factor in selection situations.
  - Non-monetary recognition: plaque, lunch, newsletter



## Risks of Attendance Incentives

- Employees coming to work who should stay home – rather than infecting others; other safety hazards
- People who miss a day early in the reward period lose incentive to attend after
- Rewarding employees for behaviour that would happen anyway



## Risks of Attendance Incentives

- Unbudgeted accrued liability
- Severance costs when employer can least afford it, & potential director liability
- Unions converting pay incentive into a demand for more pay for all



## Attendance Management Strategies

- Several keys to success:
  - Fair, consistent approach
  - Responsive to individual circumstances
    - Especially when addressing illness and disability
  - Clearly identified responsibilities and expectations
  - Document, document, document



## Attendance Management Strategies: What Do You Do When Employee Misses Work?

- Collect evidence to categorize absence
  - 1<sup>st</sup> contact with employee is critical
  - Provide opportunity to give reason
  - Request proof if appropriate



## Medical Evidence: A Key Component

- Three essential medical questions
  - Is this a legitimate medical absence?
  - If yes, when can the employee return to regular work or any work?
  - What can I do to facilitate the earliest return of the employee to work?



## Medical Evidence: Purposes

- Proof of illness/disability
- Proof of fitness to return to work
- Proof of fitness for posted position
- Proof of need to accommodate
- Facilitation of accommodation



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## The Accommodation Process

- Once medical information is obtained, the search for accommodation begins





## The Accommodation Process

- Steps in the accommodation process
  - Identify the need for accommodation
  - Consult appropriate workplace parties
  - Make an informed decision
  - Communicate the decision
  - Implement the decision and monitor closely



## Termination of Employment

- Key question: When does an employee's medical absence justify termination of employment?



## Termination of Employment

- Termination as a result of innocent absenteeism (unionized setting) or frustration of contract (non-unionized setting) will be lawful if employee's medical condition precludes returning to work (with or without accommodation) in the foreseeable future



## Termination of Employment

- But remember...
  - Employer needs to ensure that the medical evidence from the employee clearly supports the inability to return to work
  - Termination as a result of frustration/innocent absenteeism may not relieve an employer of the requirement to pay (e.g., Ontario and Manitoba)



## Restrictive Covenants

- Employers often attempt to limit the ability of their employees to work for competitors or solicit their clients or employees after leaving employment.
- Employers often ask employees at the time of hire to sign employment agreements containing restrictive covenants such as non-competition or non-solicitation clauses.



## Non-Competition Covenants

- Non-competition clauses are intended to prevent the employee from competing with the employer during employment and for a certain period of time after the termination of employment.
- They set out a *geographic area* within which and a *time frame* during which the employee cannot work for competitors.



## Non-Solicitation Covenants

- Non-solicitation clauses are intended to prevent the employee from soliciting the employer's *employees and clients* during the course of employment and for a certain period of time after termination of employment.
- Clients: existing and potential clients the employee knows or ought to know the employer intends to solicit business from in the future.



## Enforceability of Restrictive Covenants

- Restrictive covenants are considered a restraint of trade and contrary to public policy.
- The courts will enforce restrictive covenants only if the terms are reasonable.
- Courts are more likely to give effect to non-solicitation clauses than non-competes because they are less restrictive.





## Test for Restrictive Covenants

- The employer has a proprietary interest entitled to protection
- The terms of the covenant are reasonable
- The terms of the covenant are clear, certain, and not vague
- The restraint is reasonable in terms of the public interest



## Confidentiality Agreements

- They restrict/prohibit the employee from using or disclosing the employer's confidential information during or after the termination of employment.
- To be enforceable, the information sought to be protected must be "confidential" and not be in the public domain prior to the date of receipt by the employee.



## Confidentiality Agreements

- Examples of confidential information:
  - The employer's proprietary, financial, business, and operational information
  - Suppliers' and customers' (both existing and prospective), or employees' personal information



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## Enforcement

- Demand letter
- Injunction
- Damages
- Anton Pillar Order



## Demand Letter

- Review contractual obligation
- Consider enforceability of provision and the employment agreement generally
- Outline alleged conduct in breach of covenant
- Set out remedy
- Establish short timeline
- Threaten apocalypse now!



## Injunction

- Draft pleadings initiate legal proceedings
- Does contract expressly provide for injunctive relief?
- Prepare affidavits with evidence of breach and harm



## Injunction

- Offer undertaking on damages if injunction set aside
- Bring on application as soon as possible
- Interim injunction = Strategic victory
- Permanent injunction



## Damages

- Action against former employee or new employer, or both
- Claim for:
  - Damages
    - What the former employer has lost
  - Accounting of profit
    - What the former employee has gained





## Anton Piller Order

- Rare
- Court order providing right to search premises and seize evidence w/o warning
- Require:
  - Strong prima facie case
  - Alleged damage (potential or actual) must be serious



## Anton Piller Order

- (Cont'd)
  - Convincing evidence the defendant has incriminating documents/evidence
  - Real possibility of defendant destroying same
- Game over



## The Quebec perspective

- Civil Code of Québec is a general law that contains all of the basic provisions that govern life in Quebec society, i.e., the relationships among citizens and the relationships between people and property.
- Provides for employee's general duty of loyalty toward the employer that lasts for *some time* after termination of employment:



## The Quebec perspective

- **2088.** The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.
- These obligations continue for a reasonable time after cessation of the contract, and permanently where the information concerns the reputation and private life of another person.



## Duty of Loyalty

- “Reasonable” period of time varies depending on the importance of the employee’s position, access to strategic business information, nature of the strategic business information, nature of industry or area of activity, competitive environment, the employee’s new position and new employer, etc.
- Section 2088 C.C.Q. has been the basis for legal action; supposes that the employee has acted in a manner imprudent, unfaithful and/or dishonest towards his former employer.



## Duty of Loyalty

- Examples of successful actions based on Section 2088 C.C.Q.:
  - Theft of the former employer's business information such as price lists, client lists, intellectual property
  - Direct and targeted client solicitation
  - The solicitation of key employees of the former employer in specific circumstances



## Non-Competition Covenants

- It is established, however, that the scope of the duty of loyalty is not stricter than what can be imposed by a contractual restrictive covenant.
- The Civil Code also provides that the employment contract can include restraints of trade. There are conditions of form and conditions of content:



## Non-Competition Covenants

- **2089.** The parties may stipulate in writing and in express terms that, even after the termination of the contract, the employee may neither compete with his employer nor participate in any capacity whatsoever in an enterprise that would then compete with him.
- Such a stipulation shall be limited as to time, place and type of employment, to whatever is necessary for the protection of the legitimate interests of the employer.
- The burden of proof that the stipulation is valid is on the employer.





## Interpretation of Non-Competition Covenants

- The Quebec courts will not read down an unenforceable term in order to make it legal and enforceable.
- The Quebec courts will not apply the “blue-pencil rule,” and will not delete offending terminology from the contractual term to make it enforceable.
- The Quebec court will not apply “funnel clauses” or “level clauses.”



## Drafting Tips

- Drafting must clear and precise
- Time limitations should not exceed the duration of employment
- Geographic limitations should not include territories where the employee never performed his functions
- Non-solicitation clauses should be limited to those clients the employee dealt with specifically, or those potential clients the employee was responsible for developing



## Drafting Tips

- Type of prohibited activities should be specific and in relation to the tasks performed by the employee – not designated in general terms such as: “as contractor, employer, employee, etc.”, and should not refer to activities “similar” to activities of the employer, or “in competition” with the activities of the employer



## Avoiding Common Pitfalls

- Is a non-solicitation clause a non-competition clause?
- Should there be a geographic limit to non-solicitation clauses?
- Including a non compete clause during the course of employment is a serious challenge.
- The employee's refusal to execute the clause has not been construed as sufficient grounds to terminate for cause, and may give rise to constructive dismissal claims.



## Avoiding Common Pitfalls

- A non-competition clause found in a contract of employment is null and void if termination is made without just and sufficient cause:
  - **2095.** An employer may not avail himself of a stipulation of non-competition if he has resiliated the contract without a serious reason or if he has himself given the employee such a reason for resiliating the contract.



## Avoiding Common Pitfalls

- Upon termination of an employee without cause, the employer must reintroduce the non-competition clause in the release document (or transaction). May give rise to new negotiations with the employee.



## Conclusion

- If employers want to rely on restrictive covenants, they should:
  - Ensure the terms of the restrictive covenant are clear, unambiguous, and reasonable.
  - Consider the role the employee plays in the organization and the interests that need to be protected when the employee leaves.



## Conclusion

- Consider separating the non-competition clause and non-solicitation clause into two separate provisions.
- Consider providing financial consideration to the employee for the restrictive covenants at the time of termination.





## Conclusion

- Consider a contractual methodology for calculating damages, or provide for liquidated damages.
- Ensure that new hires are not bound by a restrictive covenant.



## **Damages Awards in Employment Law**

- Notice periods
- Contractual terms limiting notice
- Damages for employer misconduct
- Aggravated damages
- Punitive damages
- Negligent misrepresentation during recruitment
- Damages and benefits coverage
- Other developments



## Notice Periods

- Leading decision: *Bardal v. The Globe and Mail*
- “One month per year of service” guideline
- Cases where courts decline to follow “one month per year of service” guideline



## Contractual Terms Limiting Notice

- Some principles:
  - Terms need to be clear and unambiguous
  - Depending on contract terms, express contractual severance may remove employee's duty to mitigate



## Damages for Employer Misconduct

- In wake of death of “*Wallace* damages,” courts take a more reluctant approach to awards of aggravated damages
- Key takeaway: such awards continue to be rare
- Aggravated damages: courts look for misconduct beyond dismissal



## Aggravated Damages

- The state of the law post *Wallace* and *Honda*
- *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251
- *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112



## Punitive Damages

- Punitive damages are rare
- Until recently, punitive damages were modest: Alberta Court of Appeal's comments in *Elgert* decision
- 2011 Ontario case *Pate Estate v. Algway-Canendish (Townships)* 2011 ONSC 6620: \$550,000 in punitive damages



## Negligent Misrepresentation During Recruitment

- Employer recruitment can present risk for employers.
- *Khan v. Vernon Jubilee Hospital and Interior Health Authority* 2008 BCSC 1637
- Contrast *Khan* with:
  - *Lesage v. Canadian Forest Products Ltd* 2011 BCCA 259





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## Damages and Benefits Coverage

- Liability for illness during the notice period
- Subtraction of benefits from an award of notice



## Other Developments in the Law of Damages

- Working notice: availability of damages and quantum
- Recent developments in mitigation
- Privacy: recognition of the tort of “Intrusion upon Seclusion”
  - Damages for privacy breaches



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