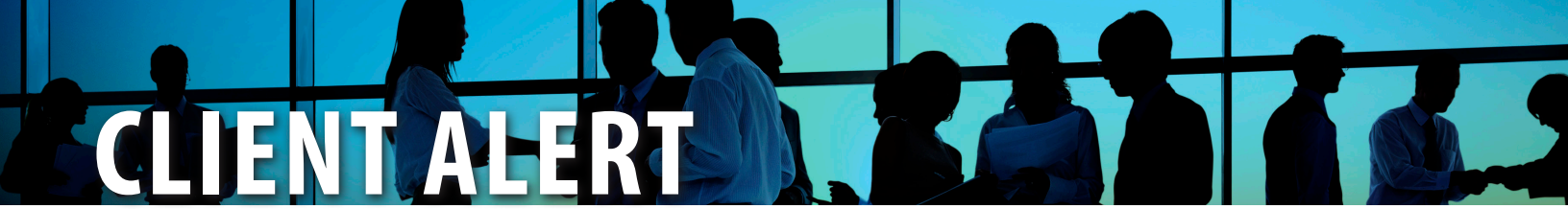

MANAGING THE EMPLOYMENT RELATIONSHIP IN ONTARIO

by Eric Kay

What federal or provincial laws govern the employment relationship?

The *Employment Standards Act, 2000* ("***ESA***") sets out most of the minimum employment standards for provincially regulated workplaces in Ontario.

There are a number of other statutes affecting the employment relationship in provincially regulated workplaces in Ontario, including:

- *Accessibility Ontarians with Disabilities Act, 2005*
- *Agricultural Employees Protection Act, 2002*
- *Apprenticeship and Certification Act, 1998*
- *Cannabis Act, 2017*
- *Crown Employees Collective Bargaining Act, 1993*
- *Employers and Employees Act*
- *Employment Insurance Act*
- *Employment Protection for Foreign Nationals Act, 2009*
- *Employment Standards Act, 2000*
- *Fair Workplaces, Better Jobs Act, 2017*
- *Hospital Labour Disputes Arbitration Act, 1990*
- *Human Rights Code (Ontario)*
- *Labour Relations Act, 1995*
- *Ministry of Labour Act, 1990*
- *Occupational Health and Safety Act, 1990*
- *Ontarians with Disabilities Act, 2001*
- *Ontario College of Trades and Apprenticeship Act, 2009*
- *Ontario Labour Mobility Act, 2009*
- *Pay Equity Act, 1990*
- *Pay Transparency Act, 2018*
- *Police Records Check Reform Act, 2015*
- *Provincial Schools Negotiations Act, 1990*
- *Protecting Child Performers Act, 2015*
- *Public Sector Labour Relations Transition Act, 1997*
- *Public Service of Ontario Act, 2006*
- *Retail Business Holidays Act*
- *Rights of Labour Act*
- *Smoke-Free Ontario Act, 2017*
- *Trades Qualification and Apprenticeship Act, 1990*
- *Wages Act; and*
- *Workplace Safety and Insurance Act, 1997.*

There are a number of other statutes affecting the employment relationship in federally regulated workplaces in Ontario, including:

- Canada Labour Code
- Canadian Human Rights Act
- Employment Equity Act
- Employment Insurance Act, and
- Personal Information Protection and Electronic Documents Act.

Who do these cover, including categories of workers?

The definition of "employee" and "worker" can vary and depending on the circumstances, independent contractors, dependent contractors, consultants, interns, employees of affiliates, employees from temporary agencies and third party employees may be considered employees or workers for some common law or statutory purposes. The *Labour Relations Act, 1995*, for instance, includes "dependent contractor" in the definition of "employee". The *Occupational Health and Safety Act* defines "worker" as including self-employed individuals, independent contractors and temporary workers.

1. Employee/Contractor Misclassification

A person may be classified as an independent contractor at common law, but because of economic dependence on and control by the entity for which the services are performed, legally qualify as a dependent contractor.

A person may also be classified as a dependent contractor notwithstanding that they conduct business through a corporation and hires others to assist in the performance of the work. The usual distinction between a dependent contractor as compared to an independent contractor is that a dependent contractor is entitled to reasonable notice of termination of the contracting relationship.

Different employment related legislation (i.e., tax and safety) may treat dependent or independent contractors as employees or workers for purposes of thast particular legislation.

Though the distinction between independent contractors and employees has not been fully clarified, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) provided new rules with respect to misclassification. First, if there is a question about whether someone is an employee or an independent contractor, a "reverse onus" is now triggered, meaning the burden is now on the employer to prove that the person is an independent contractor and not an employee under the *Employment Standards Act*. Second, if a person is misclassified, that is the individual is treated as an independent contractor when they are in practice an employee, the Ministry of Labour may commence a prosecution against that employer. The "reverse onus" provision does not apply in a Ministry of Labour prosecution.

2. Contracts

Must an employment contract be in writing?

While preferable for the protection of both parties, an employment

contract need not be in writing. To be enforceable, an employment contract simply requires the requisite elements of any contract: an offer made with the intent to create legal relations, acceptance of that offer, consideration, capacity, and legality. Where a written contract of employment has been contemplated but not signed, the contractual agreement will be enforceable if the conduct of the parties shows that their clear intent was to enter into a binding contract. In many cases contracts are part oral, part written, and part implied by the common law.

Are any terms implied into employment contracts?

Employment contracts can be oral or written and may include express and implied terms. It is implied in every contract of employment that an employer will provide the employee with reasonable notice in the event of termination, except in the event of just cause. Other examples of implied terms are that employees will perform their duties with reasonable skill and diligence, and that they have a duty of loyalty to their employee. Usually only senior employees would owe a fiduciary duty to their employers.

In addition, contractual terms which conflict with the minimum employment standards prescribed by the ***ESA*** will not be enforced and may result in the contract being voidable.

Are mandatory arbitration agreements enforceable?

Section 7(1) of the *Arbitrations Act*, 1991 states:

"If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding."

Ontario courts have held that the language of section 7(1) of the *Arbitrations Act*, 1991 is mandatory and requires the court to stay a proceeding when there is an agreement to arbitrate and the dispute is properly within the mandate of the arbitrator. It is for the arbitrator to determine in the first instance whether a matter in dispute is subject to arbitration.

The court may refuse to stay the proceeding in the following cases: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is not valid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; (4) the motion was brought with undue delay; and (5) the matter is a proper one for default or summary judgement.

With respect to (3), certain rights under the *Employment Standards Act* cannot be made subject to arbitration.

How can employers make changes to existing employment agreements?

Any amendment or renegotiation of the employment agreement must usually be agreed to by both parties and must be founded upon new consideration. An employee can make unilateral changes to certain terms of employment if that is permitted under the contract of employment or with sufficient notice of the proposed change to the employee. Continued employment is not valid consideration for a mutually agreed variation. If a material change to an employment agreement is made unilaterally, without reasonable notice and the employee does not consent, the employee may bring an action for constructive dismissal or claim damages for breach of contract.

Key Take-Aways

When employers obtain the necessary employment law advice about recruiting, hiring and managing their workforce in Ontario, they will be better prepared from a business perspective and at less risk from a legal perspective.

Employment law is constantly evolving in Ontario, so please contact **Eric Kay** at ekay@dickinsonwright.com to discuss your general employment law needs or to obtain advice with respect to any particular issue or problem in managing your workforce in Ontario.

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