



# **The New World of Work: 2021 HR Law Year in Review & Trends to Watch in 2022**

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# Presenters



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2021 HR Law Year in Review and Trends to Watch in 2022



# **2021 HR Law Year in Review and Trends to Watch in 2022**

## **Session Roadmap**

- Bill 27
- Employment Agreements
- Harassment & Workplace Investigations
- Vaccination Policies

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## General Snapshot



- COVID-19 on the decline in Canada
- Ontario lifting several COVID-19 restrictions effective March 1
- Developing body of COVID-19 specific case law
- Various legislative developments in Ontario and the Federal sphere

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**BILL 27**  
***WORKING FOR WORKERS ACT***





## BILL 27

### **New “Right to Disconnect” Law**

#### *Working for Workers Act, 2021*

- Requires employers with 25 or more employees to implement a disconnecting from work policy
- Practical challenges:
  - Legislation lacks guidance about the contents of the policy
  - Enforcing compliance with the policy

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## BILL 27

### **New Ban on Non-Competition Agreements**

*Working for Workers Act, 2021*

- Prohibits employers from using non-compete agreements that prevent employees from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business
- Exceptions:
  1. Sale of a business exception
  2. Executive employee exception



## BILL 27

### Takeaways



- Identify potential problem areas that may be affected by right to disconnect
- Monitor and stay on top of developments
- Proceed with caution when using non-competition restrictions

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# EMPLOYMENT AGREEMENTS





# EMPLOYMENT AGREEMENTS

## Enforceability of Termination Clauses

*Waksdale v Swegon North America Inc*

- SCC denied leave to appeal
- Ontario lower courts in 2021 have followed *Waksdale*
- Governs enforceability of termination clauses in ON for the foreseeable future
  - Increased judicial scrutiny of termination clauses in employment contracts
  - If one termination provision violates the *ESA*, it can render a separate termination provision unenforceable





# EMPLOYMENT AGREEMENTS

## **Enforceability of Termination Clauses: Relevance of Employee Sophistication**

*Rahman v Cannon Design Architecture*

- Upheld a termination clause because the employee was sophisticated and obtained legal advice

*Livshin v The Clinic Network Canada Inc and Campbell-Givons v Humber River Hospital*

- Both decisions found that employee sophistication and retention of legal advice does not impact the enforceability of termination clauses



# EMPLOYMENT AGREEMENTS

## Takeaways



- Employment agreements must meet minimum employment standards
- Employee sophistication/negotiation may help employers
- Invalid termination provisions substantially increase termination payments
- Reassess employment agreements

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# **HARASSMENT & WORKPLACE INVESTIGATIONS**





## HARASSMENT & WORKPLACE INVESTIGATIONS

### **Costly Consequences for Mishandling an Investigation**

#### *McGraw v Southgate (Township)*

- Rushed/inadequate internal investigation led to award of \$190,000 in damages



# HARASSMENT & WORKPLACE INVESTIGATIONS

## Takeaways



- Obtain legal advice to minimize exposure to costly legal liabilities
- Ensure procedural fairness
- For serious and complex allegations, retain an independent investigator with expertise in the nature of the allegations
- Consider undertaking a systems and processes review

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# **COVID-19 VACCINATION POLICIES**







## COVID-19 VACCINATION POLICIES

### **Accommodating Vaccination Exemptions**

#### Medical Exemptions

- Required for individuals who are unable to receive the vaccine for medical or disability-related reasons

#### Creed/Religious Exemptions

- Personal preferences and singular beliefs against vaccination are not protected





## **COVID-19 VACCINATION POLICIES**

### **Litigation Related to Vaccination Policies in Non-Unionized Workplaces**

- Flood of litigation related to:
  - Constructive dismissal claims
  - Wrongful dismissal claims
  - Human rights claims related to disability or creed/religion
- Awaiting court decisions related to non-unionized workplaces





## COVID-19 VACCINATION POLICIES

### **Litigation Related to Vaccination Policies in Unionized Workplaces**

#### *United Food and Commercial Workers' Union v Paragon Protection*

- Mandatory vaccination policy was reasonable for security guards who performed work on client sites and interacted with the public

#### *Electrical Safety Authority v Power Workers' Union*

- Mandatory vaccination policy was unreasonable for a primarily remote, mostly vaccinated workforce
- Voluntary vaccination disclosure and testing policy was enough to address the health and safety risks





## COVID-19 VACCINATION POLICIES

### **Litigation Related to Vaccination Policies in Unionized Workplaces**

#### *Ontario Power Generation v Power Workers' Union*

- Upheld many aspects of a “vaccination or test” policy
  - Reasonable to put unvaccinated employees who refuse to test on an unpaid leave of absence
  - Failure to comply may provide cause for dismissal



# COVID-19 VACCINATION POLICIES

## Takeaways



- Accommodate creed and disability exemptions
- Account for workplace realities
- Consider dynamic pandemic environment
- Obtain legal advice
- Assess risk tolerance

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