

The logo for Dentons, consisting of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the slide is a dark purple gradient with a large, semi-transparent white arrow shape pointing right, and a close-up image of a sunflower's head in shades of purple and orange.

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

2023 Year in review (and what to expect in 2024)

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Grow | Protect | Operate | Finance

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Year in review: Wrongful Dismissals

Jeff Bastien

Wrongful dismissal awards exceeding 24 months

Lynch v. Avaya Canada Corporation, 2023 ONCA 696

- Court of appeal upheld motion judge's award of a 30-month notice period to a professional engineer.
- “Exceptional circumstances” present justified a notice period exceeding 24 months:
 - 38.5 years of service
 - 64 years old
 - Unique and specialized job (designed software to control unique hardware manufactured by the company)
 - Comparable employment in Belleville would be scarce, even if available in cities like Toronto or Ottawa
- Similar Ontario case *Milwid v. IBM Canada Ltd.*, 2023 ONCA 702 upheld award of 26 months' reasonable notice.

Successful just cause termination (plus more!)

Breen v. Foremost Industries Ltd., 2023 ABKB 552

- CEO terminated for just cause: failing to follow policies and procedures, misrepresentations to the Board, serious and habitual misconduct in discharge of duties.
- Wrongful dismissal claim rejected: misconduct was serious enough to be incompatible with the employment relationship. The company was “completely justified” in summarily dismissing the CEO with cause.
- Employer’s counterclaim for breach of fiduciary duties was successful: awarded more than \$500,000 in damages for amounts he had received as gifts and in breach of his fiduciary and contractual duties.
- Employer also received \$50,000 in punitive damages.

Termination Clause upheld

Forbes v. Glenmore Printing Ltd., 2023 BCSC 25

- Plaintiff argued that the termination clause in his employment agreement was not enforceable because it provided for less entitlement than required under the *Employment Standards Act*.
 - Termination clause mirrored the ESA's notice formula, which meant it capped at 8 weeks' notice.
- The argument was based on *Shore v. Ladner Downs*, which held that a termination clause that has the potential of not meeting statutory minimum standards is null and void from the beginning, not just when it actually falls below the ESA.
- Here the plaintiff argued that there would have been a possible contravention of the minimum requirements in the ESA if he had been part of a group termination because additional notice is required under the ESA in such cases (he was not actually part of a group termination in this case).
- The court rejected the argument and found the termination clause enforceable.
 - There was no express provision in the employment contract waiving the employer's obligation to comply with the group termination requirements.
 - The common law will not imply a contractual term that is contrary to the ESA.



Year in review: Labour Relations

Emily Kroboth

Labour relations

Ontario

- Vaccination Policies
 - *Toronto (City) v Toronto Civic Employees' Union, Cupe, Local 416*, 2023 CanLII 94043 (ON LA)
 - Vaccine policy “no longer reasonable” as of September 1, 2022
 - Risks of transmission and severity of symptoms no longer severe enough to justify policy
 - *Lakeridge Health v CUPE, Local 6364*, 2023 CanLII 33942 (ON LA)
 - Vaccine policy and terminations for failure to comply “justified” due to life-saving treatment offered, and a challenging number of vacancies
 - Four-week unpaid leave should have pre-dated the terminations, to give employees time to reflect

Labour relations

Alberta and Quebec

- The impact of remote work
 - Picketing (Alberta)
 - Where can remote workers picket?
 - An employee's home is not a "place of employment" (for the purposes of picketing)
 - Replacement workers (Quebec)
 - Unionized employees cannot perform the work of locked-out workers from their homes



Year in review:
Human rights
Arianne Bouchard

Human rights

British-Columbia (Human Rights Tribunal) v Gibraltar Mines Ltd, 2023 BCCA 168

- The British Columbia Court of Appeal upheld the Tribunal's broadening of the test for family status discrimination.
- As a result, discrimination can now be established without requiring a change in the employee's terms of employment.
- This approach is more aligned with the approach in other Canadian jurisdictions.

Human rights

Tolentino v HMK Alberta, 2023 AHRC 112

- An employee was exposed to a single colleague's racist comments during a video meeting.
- The employer took prompt and comprehensive steps to address the situation.
- The Tribunal held that the single incident did not create a toxic workplace and the employer, by acting immediately to address the incident did not discriminate against the complainant employee.

Human rights

Oil Limited v. Haseeb, 2023 ONCA 364

- An employer withdraw the offer of employment it made to an employee after he disclosed not being permanently eligible to work in Canada, despite his representation to the contrary during the interview process.
- A requirement that job applicants be eligible to work in Canada permanently constituted direct discrimination on the basis of citizenship and is therefore prohibited under the *Ontario Human Rights Code*.
- The establishment of a prima facie discrimination case does not require that discrimination be the only reason or even the predominant one for the impugned measure, it just has to be one of the reason.

Human rights

Association des procureurs aux poursuites criminelles et pénales (Létourneau) v. Directeur des poursuites criminelles et pénales, 2023 QCCFP 7

- A public prosecutor was dismissed after his employer concluded that accommodating him so he could continue to work would pose undue hardship for the organization.
- Prior making this conclusion, the employer had to rigorously and exhaustively assess the tasks of all other positions available within the organization in which it could potentially reassigns the employee against the accommodations he requested by the employee.
- Even if this is a lengthy and complex process, an employee's rights cannot be undermined by administrative considerations that do not constitute undue hardship.



Year in review: Occupational health and safety

Cristina Wendel

Occupational health and safety

Legislative changes: Alberta

- A number of amendments to Alberta's *Occupational Health and Safety Code* came into effect on March 31, 2023.
- Changes are intended to better reflect current health and safety best practices, remove duplication, reduce administrative burden, and better align the Alberta OHS Code with the requirements in other Canadian jurisdictions.
- Changes were made to the following Parts of the OHS Code:
 - Part 11 – First aid
 - Part 15 – Managing control of hazardous energy
 - Part 16 – Noise exposure
 - Part 17 – Overhead power lines
 - Part 33 – Explosives
 - Part 36 – Mining
 - Part 37 – Oil and gas wells
 - Part 40 – Utility workers – electrical
 - Miscellaneous

Occupational health and safety

Legislative changes: Quebec

- Bill 42, *An Act to prevent and fight psychological harassment and sexual violence in the workplace* was tabled November 23, 2023.
- This Bill makes amendments to a number of other Acts, aimed at protecting workers in the workplace and in particular, preventing and fighting psychological harassment and sexual violence in the workplace.
- Changes proposed by the Bill include:
 - Amending the *Act respecting occupational health and safety* to include a definition of the term “sexual violence”; and
 - Providing the government with the regulatory authority to implement measures to be taken by an employer to prevent or end sexual violence.
- If adopted into law, the measures set out by Bill 42 are expected to have significant implications for employers.

Occupational health and safety

Case law: *R v Sudbury*

- The Supreme Court of Canada released its decision in *R v Greater Sudbury (City)* on November 10, 2023.
- In a rare split decision, the SCC effectively upheld the Ontario Court of Appeal's decision that the element of control does not factor into the analysis of whether the City could be liable as an employer.
- However, the degree of control is relevant when considering due diligence.
- The SCC reviewed a number of considerations that should be reviewed in the due diligence analysis, including the extent and effectiveness of any pre-screening, supervision and monitoring of the contractor by the “employer”.
- The “employer’s” skill, or lack thereof, should also be considered.
- The extent to which this decision will be applied outside Ontario remains to be seen.



2024 Employment law legislative updates

Stephanie Lewis

British Columbia

Freedom of Information and Protection of Privacy Act

- Public sector employers must now:
 - Give notice of a “privacy breach” to any “affected individual” and to the BC Privacy Commissioner, and
 - Implement a Privacy Management Program

Pay Transparency Act

- New obligations regarding:
 - Pay transparency discussions
 - Job posting requirements
 - Pay transparency reports

Workers Compensation Amendment Act (No. 2), 2022

- New obligations regarding:
 - The duty to cooperate in the return-to-work process
 - The duty to maintain an injured worker’s employment

British Columbia

Future and anticipated changes

Bill 48

- Once in effect, Bill 48 will amend the BC *Employment Standards Act* and *Workers Compensation Act* to introduce basic employment rights for workers in the gig economy.

Pay transparency

- While the *Pay Transparency Act* was passed just last year, we expected that further amendments or regulations will be introduced with the aim of ensuring compliance with the legislation.

Alberta

Key changes to Alberta's *Occupational Health and Safety Code*

- **Confined spaces** - Employers are responsible for ensuring that the atmosphere of a confined space is tested by a competent worker before a worker enters the space.
- **First Aid** - First aid training and first aid kits must comply with various Canadian Standards Association (CSA) safety standards
- **Noise Exposure** - The threshold at which a noise exposure assessment must be conducted was reduced, and the assessment must be conducted in accordance with CSA standards.

Ontario

Working for Workers Act, 2021

- All “Temporary Help Agencies” and “Recruitment Agencies” must now hold a license in order to operate in Ontario.

Working for Workers Act, 2022

- The Ontario *Employment Standards Act, 2000* added definitions for “business consultant” and “information technology consultant” and now provides that where an individual meets one of those definitions, that person must provide their services through a corporation or sole proprietorship and be paid a fee of at least CA\$60/hour.
 - If the above is not satisfied, that individual runs the risk of being deemed an employee for the purposes of the ESA, as opposed to a contractor.

Working for Workers Act, 2023

- Remote Workers now count towards the 50-employee mass termination threshold, as an employer's “establishment” now includes the home offices of workers who work solely from their home office

Ontario

Future and anticipated changes

Working for Workers Four Act, 2023

- If passed, the *Working for Workers Four Act, 2023* would:
 - Require employers to include expected salary ranges in their open job postings;
 - Require employers to disclose of the use of artificial intelligence during the hiring process; and
 - Prohibit employers from requiring that job applicants have prior Canadian work experience.

Digital Platform Workers Rights Act

- Similar to BC, Ontario has introduced legislation which, once in effect, will intend to introduce basic employment rights for workers in the gig economy.

Quebec

The Act to modernize the occupational health and safety system

- Certain decisions may be challenged directly before the Administrative Labour Tribunal, without going through an application for review with the Direction générale de la révision administrative.

An Act respecting the regulation of child labour

- Children under 14 years old are restricted to specific jobs and must have their parent's approval to work
- Children who are required to attend school may only work 17 hour per week (with a maximum of 10 of those hours being during the school week)
- There are fines for non-compliance with this legislation

Anticipated Changes - An Act to prevent and fight psychological harassment and sexual violence in the workplace

- If passed, Quebec's occupational health and safety legislation may be amended to include a definition of the term "sexual violence" and to provide the government with the regulatory authority to implement measures to be taken by an employer to prevent or end sexual violence.

Federal

Canada Labour Code Amendments

- Employees must be reimbursed for work-related expenses.
- Menstrual products must be made available in each toilet room at the workplace.
- Dismissed employees are entitled to increased individual notice of termination entitlements:
 - Graduated notice based on years of service, and
 - A written statement confirming certain information related to the employee's employment.

Federal

2024 Deadlines

June 1, 2024 – *Accessible Canada Act and Regulations*

- 10-99 employees: publish first annual accessibility plan
- 100 or more employees: publish first annual progress report

September 3, 2024 – *Pay Equity Regulations*

- 10 or more employees: publish pay equity plan
- Draft plan must be posted 60 days in advance for employee comments
 - Comments must be ‘considered’

Federal

Anticipated changes for 2024

It is expected that regulations governing the following topics will be published in 2024:

- The provision of benefits to employees on LTD
- Safety requirements for sound levels and PPE
- Toilet inclusivity
- Exposure limits
- Industry specific OHS regulations
- Pay equity compliance

The Government of Canada's "Forward Regulatory Plan"

- The Government of Canada is intending to introduce a number of regulatory initiatives as part of its "Forward Regulatory Plan"



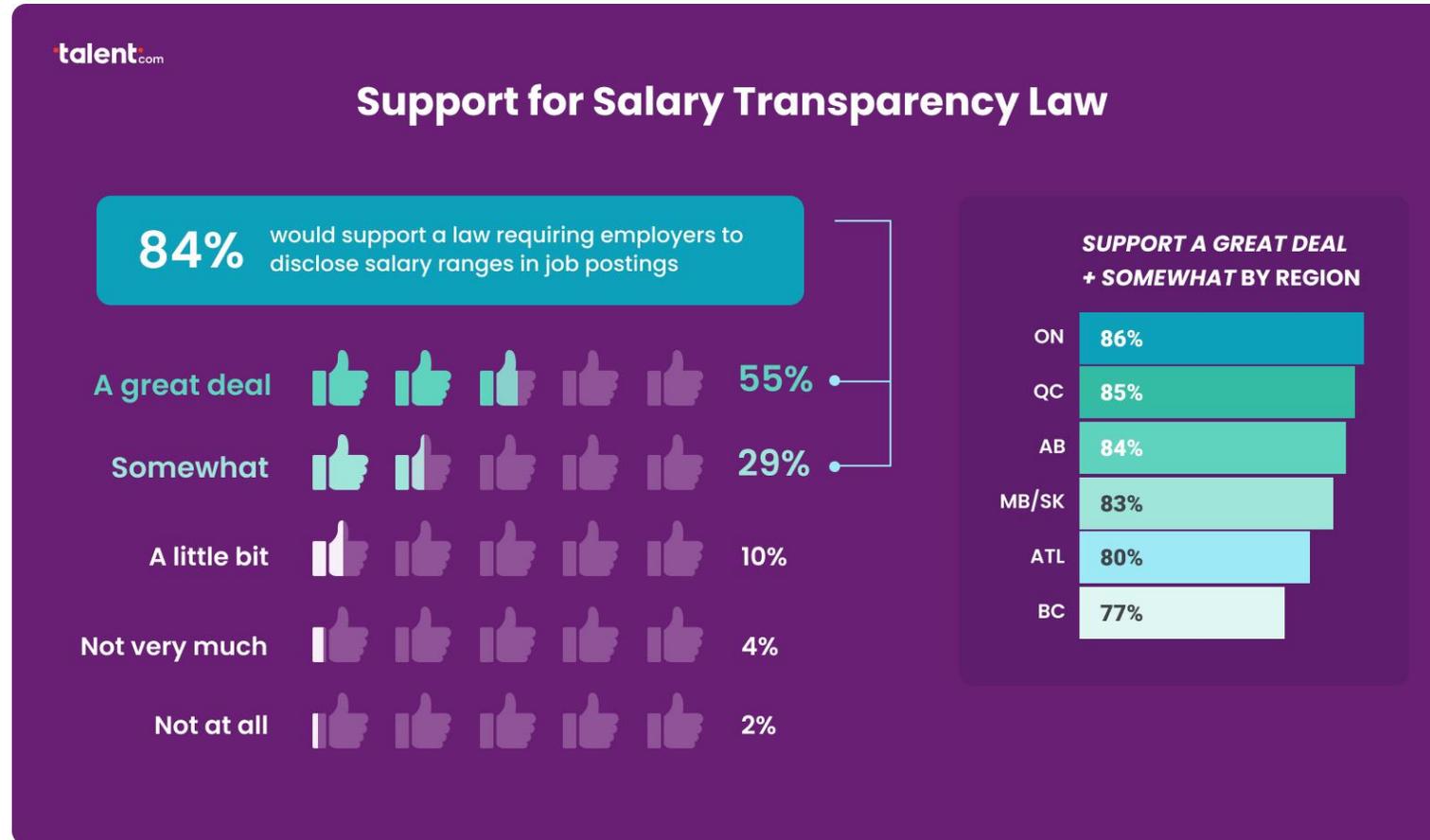
What to expect in 2024

Andy Pushalik

Generative AI in HR

- Expect broader adoption of generative AI tools in the workplace
- May 2023, U.S. Equal Employment Opportunity Commission released its guidance on preventing discrimination against job seekers and workers from use of AI
- Bill 149, Working for Workers Four Act, 2023 (Ontario):
 - **Disclosing use of AI in recruitment:** Employers who use AI to screen, assess or select applicants for the position must include in the posting a statement disclosing the use of AI.

Pay transparency



Would Canadians Support a Law on Salary Transparency? , online: <https://blog.talent.com/en/would-canadians-support-a-law-on-salary-transparency>

Pay transparency

- According to a survey by the U.S. National Women's Law Center, over 25% of the U.S. labour force are already covered by some sort of pay range transparency law
- In Canada, B.C. and P.E.I. have implemented pay transparency laws
- Ontario's proposed legislation would require every employer who advertises a publicly advertised job posting will be required to include information about the expected compensation for the position or the range of expected compensation for the position

Banning Non-Disclosure Agreements

- Ontario Government announced that it would be launching consultations to “[r]estrict the use of Non-Disclosure Agreements (NDAs) in the settlement of cases of workplace sexual harassment, misconduct or violence.”
- Prince Edward Island became the first jurisdiction in Canada to limit the use of NDAs in cases of discrimination and harassment with the passage of the Non-Disclosure Agreements Act in November 2021.
- Nova Scotia and Manitoba have previously tabled similar legislation, but those laws have not passed.

Modern Slavery reporting requirements

- May 3, 2023, Canada passed its first reporting legislation for modern slavery and child labour.
- Reporting Entities are now required to file their first set of reports by **May 31, 2024**.
- December 2023 Public Safety Canada released its long-awaited guidance on the reporting requirements.
- This is a significant reporting requirement.

Thank you



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