DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Canadian Employment and Labour Law: 2024 Year in Review

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Grow | Protect | Operate | Finance

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Notable wrongful dismissal cases

Julia Dales

Ontario courts continue striking termination clauses “at any time”

Dufault v the Corporation of the Township of Ignace, 2024 ONSC 1029

- Dufault was employed as Youth Engagement Coordinator for the Township under a fixed term agreement.
- Term of the agreement was November 24, 2022 to December 31, 2024.
- Township terminated her employment on January 26, 2023.
- An early termination clause in her agreement purported to limit termination entitlements to two weeks of notice or her minimum statutory entitlements.

Ontario courts continue striking termination clauses “at any time”

Dufault v the Corporation of the Township of Ignace, 2024 ONSC 1029

- The clause included the language:

*“The Township may at its sole discretion and without cause, terminate this Agreement and the Employee’s employment thereunder **at any time** upon giving the Employee written notice as follows…” [emphasis]*

- Among other issues with the clause, the Court stated that the “***at any time***” language undercut the employee’s rights under the ESA because the ESA prohibits an employer from terminating an employee at certain times.
- The clause was therefore held to be unenforceable.
- Due to the contract being for a fixed term, Dufault received the remaining CA$157,071.57 of salary and benefits owing to her for the balance of the contract term.

Term sheet problems

Adams v Thinkific Labs Inc. 2024 BCSC 1129

- 31-year-old software developer was dismissed after 1 year and 8 months.
- She sued for wrongful dismissal and claimed she was not bound by a termination clause that ousted her entitlement to common law notice.
- While she had signed a contract containing a termination clause, she argued she received no consideration for signing the written agreement, and that it was therefore not binding.

Term sheet problems – cont’d

Adams v Thinkific Labs Inc. 2024 BCSC 1129

- Prior to signing the agreement, the employer had sent the employee a detailed email containing her compensation, stock option grant and vesting, health benefits, other benefits, vacation, work schedule and benefit plan brochures.
- The email requested the plaintiff’s full legal name and start date then would provide her with her official employment contract.
- The employee replied on August 19, 2021, accepting the offer and providing the requested information.
- The employer then sent an employment agreement containing a termination clause and non-competition clause not mentioned before, and Adams signed it.

Term sheet problems – cont'd

Adams v Thinkific Labs Inc. 2024 BCSC 1129

- The court found the employee's acceptance of the offer by email on August 19, 2021 had created a binding contract of employment and the signed agreement was not as she received no fresh consideration.
- The "second contract" that the employee signed contained significant changes to the agreed-upon terms, did not include significant points about vacation and benefits.
- Requiring the employee's name and start date to complete the contract were "minor administrative matters."
- Continuing employment is not good enough consideration.

  > *Put quite simply, the overall tone and impression of the second document seems to be one of "we told you about all of the good stuff, but now that you are on board, here are some additional terms that we are imposing on you".*

- Court awarded employee 5 months of common law notice.

Labour relations: Alcohol and drug testing update

April Kosten

Power Workers' Union v. Canada (Attorney General), 2024 FCA 182

Background Facts

- January 2021, Canadian Nuclear Safety Commission imposed requirement for A&D testing for persons operating "Class 1" nuclear facilities.
- Unions challenged pre-placement & random testing provisions:
    1. Breached *Charter*
    2. Implementation was unreasonable on administrative law grounds

Power Workers' Union v. Canada (Attorney General)

FCA Decision

- FCA confirmed Commission has broad power & authority to implement any terms or conditions necessary for purposes of carrying-out *Nuclear Safety & Control Act.*
- Charter: Section 7 – Life, Liberty & Security of Person:
  - Not engaged.
  - Reasonable person would consider relatively non-invasive nature of seizure.
  - Absence of disciplinary consequences does not rise to level of seriousness required to engage section 7 protection.

Power Workers' Union v. Canada (Attorney General)

FCA Decision

- Charter: Section 8 – Search & Seizure:
  - "Wait & see" approach to safety not appropriate in nuclear industry.
  - Despite no evidence of impairment problem, evidence of gaps in fitness for duty programs – filling gaps is valid & compelling objective.
  - *"Safety-critical workers have diminished expectation of privacy, given nature of their work & unique environment in which that work is being performed".*
  - Breath, urine or saliva samples are amongst less intrusive when it comes to bodily searches.
  - Affected workers' interest in being left alone by government does not outweigh government's interest in intruding on privacy to advance goals of limiting risk to national security, health & safety of persons, & environment associated with development, production & use of nuclear energy.
- Charter: Section 15 – Equality:
  - Impugned provisions create distinction based on job category.
  - No distinction based on enumerated grounds of discrimination.

Power Workers' Union v. Canada (Attorney General)

FCA Decision

- Administrative challenge:
  - FCA dismissed claims of inadequate reasons for introducing regulations & fettered discretion.
  - Commission entitled to rely on 10-year consultation process to support decision.

Notable Developments in Canadian Human Rights Law

Eleni Kassaris

Updates to processes at the Human Rights Tribunals

Ontario

- Proposed updates to the Rules of Procedure of the Human Rights Tribunal of Ontario (HRTO) including the launching of a mandatory mediation process whereby all applications will proceed to a mediation, eliminating case management conference calls and summary hearings etc. The consultation period on these proposed updates have been concluded and the HRTO will communicate its next steps in the coming months.

British Columbia

- In 2024, the British Columbia Human Rights Tribunal (BCHRT) revised its Rules of Practice and Procedure regarding the time limit for responding to a complaint, its mediation policy, due dates for document disclosure, page restrictions on written arguments in applications etc.
- The BCHRT also issued new forms including the form for notice of change or withdrawal of representative, freedom of information request, accommodation request etc.
- The BCHRT also amended the Case Path Pilot Practice Direction to clarify that the Tribunal reviews a complaint file for the purpose of case path selection after the deadline for document disclosure, rather than after the parties have completed document disclosure.

Iskander v. 2363327 Ontario Incorporated and Primeau, 2024 HRTO 1122

- The Complainant alleged discrimination in employment on the basis of sex, including sexual harassment and pregnancy.
- The Complainant alleged she was terminated one week after starting as a cook with the Respondent company because she was pregnant.
- The employer alleged that the Complainant was terminated because of a Facebook post that the employee made that seemed to disclose she lacked an intention to return to the restaurant following her maternity leave.
- The Tribunal held that her Code-protected rights were breached by the employer and awarded close to $40,000 as compensation for injury to dignity, feelings and self-respect, lost wages and lost benefits.

Thomas v. Signals Design Group, 2024 BCHRT 135

- The Complainant alleged that the Respondent discriminated against her in employment on the basis of sex.
- The Complainant alleged that the Senior Vice President harassed and bullied her at work for being a woman and that upper management did not support her when she brought workplace incidents to their attention and required her to continue reporting to the Senior Vice President.
- The Complainant also claimed that she received radically different treatment as compared to her male counterparts and had to resign from her employment because of the toxic work environment.
- The Tribunal accepted there was a toxic environment but found that her allegation that her sex was a factor in the behaviour of the employer was speculative and her evidence did not take her complaint out of the realm of conjecture.

Bartender v. Finale Entertainment Inc., 2024 BCHRT 155

- The Complainant brought a human rights complaint alleging discrimination in employment based on colour.
- The white male Complainant alleged that his employment was terminated in spring 2020 because he was replaced by a Chinese worker and the employer generally showed preferential treatment to employees of Asian descent.
- The Respondent put forward evidence that the Complainant's own conduct led to the decision to terminate.
- The Tribunal concluded that the Complainant's argument was based on speculation and there was no evidence that the Respondent created the misconduct issue as a pretext to terminate the Complainant's employment.

Lambert v. Canadian Natural Resources Limited, 2024 AHRC 105

- The Chief of the Alberta Human Rights Commission and Tribunals upheld the Director of the Alberta Human Rights Commission's decision to dismiss a human rights complaint on the basis that the complainant refused a fair and reasonable settlement offer.
- The Complainant alleged that the respondent discriminated against him in the area of employment on the grounds of mental and physical disability.
- During the Commission's conciliation process, the respondent's final settlement offer was $25,000 in general damages for injury to dignity and $27,000, less statutory deductions, representing 14 weeks' base pay for damages for lost wages.
- The complainant rejected the offer, and the Director proceeded to dismiss the complaint as contemplated by section 21(3) of the *Alberta Human Rights Act.*
- The Chief held that the Respondent's settlement offer was well within a reasonable range of damages and even though the offer for lost wages represented a reasonable compromise from the Complainant's best possible result at the hearing.

Commission des droits de la personne et des droits de la jeunesse (E.B.) c. 9302-6573 Québec inc. (Bar Lucky 7), 2024 QCTDP 9

- A restaurant denied a transgender woman employment as a waitress after revealing her gender identity to the manager during training.
- In advancing her claim, the employee noted that she had received positive feedback on her skills and the employee who trained her was fully satisfied with her performance.
- The employer argued that its decision to deny employment was due to its concern that clients could react violently upon learning that they were being served by a transgender woman.
- The Tribunal held that the employer had breached the Quebec Charter of Human Rights and Freedoms, which protects gender identity and expression.
- The Tribunal awarded the Complainant $118.40 for material damages, $10,000 for moral damages, and $2,000 in punitive damages against each of the employer and the manager, emphasizing that prejudice or fear of clients being violent could not justify such discrimination.

Key takeaways

- Due to the delays at the Human Rights Tribunals across the country, employers should document matters relating to possible discrimination claims and collect and preserve evidence of defenses.
- To avoid protracted litigation, it is advisable to start settlement negotiations to resolve human rights complaints early.
- Where a settlement does not prove possible, employers may be able to have the complaint dismissed where a complainant fails to accept a fair and reasonable settlement offer (depending on the facts and your jurisdiction).

Updates on Business Immigration

Heelan Kwon

Changes to immigration programs/policies in 2024

- **2025-2027 Immigration Levels Plan**: IRCC announced reduced immigration levels for the next three years.
- **Temporary Foreign Worker Program (Labour Market Impact Assessments)**:
  - Threshold for high-wage stream increased by 20% over the provincial/territorial median wage.
  - Changes to the Low-Wage Stream: Reduced caps on the allowed proportion of low-wage foreign worker positions; refusal to process in high unemployment areas; maximum duration reduced to one year.
- **International Student Program**: 35% reduction in intake cap from 2023; heightened eligibility and documentary requirements for study permit issuance.
- **Post-Graduation Work Permits**: Narrowed eligibility criteria and introduction of new requirements for language proficiency and field of study.
- **Dependent Open Work Permits**: Dependent children no longer eligible; narrowed eligibility criteria for dependent spouses of foreign workers and students.
- Cancellation of public policy permitting **visitor-to-worker inland applications**
- End of **Flagpoling** →

End of “Flagpoling” at Ports of Entry

December 23, 2024

- Foreign nationals who hold valid temporary resident status in Canada are no longer permitted to access immigration services at a Canadian port of entry, when re-entering Canada after traveling to a bordering country (i.e., the United States or St. Pierre and Miquelon).
- Limited exemptions exist for the following individuals:
  - Citizens and lawful Permanent Residents of the United States of America;
  - Professionals and technicians under free trade agreements with the United States/Mexico, Chile, Panama, Peru, Colombia and South Korea;
  - Spouses or common law partners of professionals and technicians under free trade agreements with Panama, Colombia and South Korea;
  - International truck drivers who hold a work permit, where required to depart Canada for the purpose of their employment and held maintained status as a result of applying for renewal prior to departure; and
  - Individuals who have a pre-existing appointment booked with the CBSA for permit processing.

Express Entry – Abolishing job offer-based points

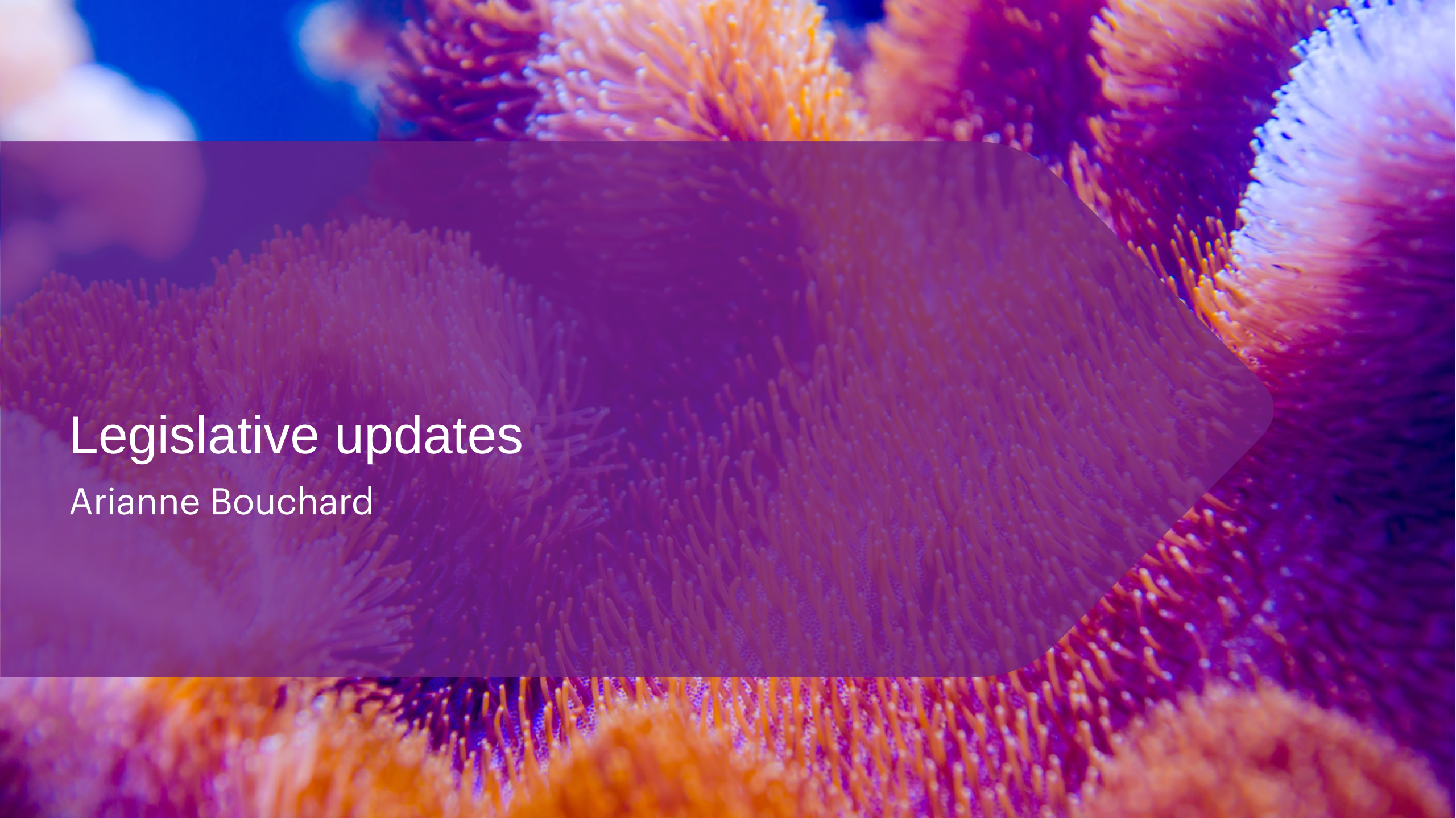
Anticipated Spring 2025

- IRCC announced that candidates for the Express Entry system (i.e., Canada's economic permanent residence system) will no longer receive additional points for having an "offer of arranged employment".
- An applicant has an "offer of arranged employment" if:
  - The applicant has a positive labour market impact assessment ("LMIA") or is currently working pursuant to an LMIA-based work permit; **OR**
  - The applicant is currently working pursuant to an LMIA-exempt, employer-specific work permit, and the applicant has worked for that employer for at least one year.
- The changes will not affect candidates who have already been invited to apply or who have an application in progress. Once the change is introduced, it will apply to all candidates with job offers in the pool as well as new candidates entering the pool.

Key takeaways for employers in 2025

! Re-evaluate immigration and mobility strategies.

! Review employee population of non-Canadian citizens and permanent resident to ensure employer compliance.



Legislative updates

Arianne Bouchard

Legislative updates: British Colmbia

New protections for Gig Workers

On **September 3, 2024**, new protections for online platform workers (“gig” workers) came into force. This introduced changes to the British Columbia *Employment Standards Act* and *Regulation* & the *Workers Compensation Act* and established the *Online Platform Workers Regulation*. Key provisions include:

- **Employment status :** Online platform workers are considered employees of the platform operator.
- **Minimum wages :** CA$20.88 / hour for “engaged time” (versus CA$17.40 for the “general” minimum wages).
- **Expense allowances** in certain circumstances.
- **Obligation to advise** the employee in advance of the estimated amount that will be payable for completed orders, 72-hour prior written notice, including reasons, of any suspensions of the worker from the platform (subject to particular exceptions) and an appeal process for the worker to pursue.
- **Detailed wage statements** for each pay period**.**
- **Top-up earnings** if a worker's pay in a given period falls below minimum standards.
- **Rights upon termination** governed by the ESA provisions.
- **Coverage through WorkSafeBC for all platform workers.**

(ESA provisions on work hours, overtime, statutory holidays, paid leave, and vacation do not apply to gig workers (except health and safety protections).

Legislative updates: Alberta

New protections regarding workplace violence and harassment

Recent amendments (coming into force after a transitional period ending on **March 31, 2025**) to the Occupational Health and Safety Code strengthen employer obligations to address violence and harassment. Employers must:

- Develop and implement a **single violence and harassment prevention plan** that includes
  - Procedures for informing workers about risks;
  - Processes for reporting and investigating incidents;
  - Provisions for protecting the confidentiality of involved parties, with disclosure only as allowed by the Code.
- **Review the prevention plan every 3 years at minimum** or when:
  - An incident indicates a need for review;
  - Changes in work or worksites may affect the potential risk for violence or harassment;
  - Upon request by the joint health and safety committee or health and safety representative.
- Provide worker **training on the prevention plan** upon implementation and any updates to ensure compliance and worker awareness.

Legislative updates: Ontario

Written agreement for alternate arrangement for vacation pay

Since **June 21, 2024**, employers are required to enter into a written agreement with an employee if they intend to pay their vacation by any other method than as a lump sum prior to the employee commencing vacation (Ontario's *Working for Workers Four Act*, 2023).

No medical notes

Since **October 28, 2024**, employers are prohibited from requiring employees to provide medical notes or certificates from a qualified health practitioner as evidence of their entitlement to their statutory sick leave (Ontario's *Working for Workers Five Act*, 2024 (Bill 190).

Application of the Occupational Health and Safety Act to telework

Since **October 28, 2024**, in accordance with the OSHA, as modified by the Ontario's *Working for Workers Five Act*, 2024 (Bill 190):

- Extension of statutory obligations and protections provided under the OSHA to workers working from home.
- Modification of the definition of "workplace harassment" and "workplace sexual harassment" to expressly include harassment that occurs in a workplace "virtually through the use of information and communications technology."

Legislative updates: Quebec

Managing Employee Absences

- On **October 9, 2024**, Bill 68, An Act to Reduce the Administrative Burden on Physicians, received Royal Assent, with key provisions effective **January 1, 2025**. The *Act* amends the *Act respecting labour standards* to limit employer rights regarding medical notes:
- Medical absences:
    - Employers cannot request supporting documentation (e.g., medical certificates) for the first three absence periods due to illness, organ or tissue donation, accidents, domestic violence, sexual violence, or a criminal act, provided each absence lasts three days or fewer within a 12-month period.
    - Documentation may be requested starting on the fourth day of an absence or the first day of the fourth absence period.
- Family or Parental absences:
    - Medical certificates are no longer required for the 10 annual family or parental statutory absence days.
    - Employers may request other supporting documentation if deemed necessary.

Legislative updates: Federal

Increased notice of termination

Since **February 1, 2024**, amendments to the Canada Labour Code introduced increased termination notice or pay in lieu of federally-regulated employees terminated without cause.

- New notice entitlements:

  3 months to < 3 years of continuous employment: 2 weeks

  3 years: 3 weeks

  4 years: 4 weeks

  5 years: 5 weeks

  6 years: 6 weeks

  7 years: 7 weeks

  8+ years: 8 weeks

- Not applicable to employees terminated for a just cause.
- Notice could be working notice, pay in lieu, or a combination.
- These changes to mandatory termination notice do not alter an employee's additional entitlement to severance pay under section 235 of the Code.
- Employers are required to provide a written statement detailing vacation, wages, severance, and other benefits owed upon termination.

Trends to watch for in 2025

Andy Pushalik

Trump tariffs

“One thing the last 20 years has taught us is that the unpredictable is more predictable than the predictable”

- Temporary layoffs
- Terminations / Group terminations
- “Economical factors such as a downturn in the economy or in a particular industry or sector of the economy may indicate that an employee may have difficulty finding another position and may justify a longer notice period.”
    - *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189

Return to office – but this time it's for real

Heads of all departments and agencies in the executive branch of Government shall, as soon as practicable, take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary.

This memorandum shall be implemented consistent with applicable law.

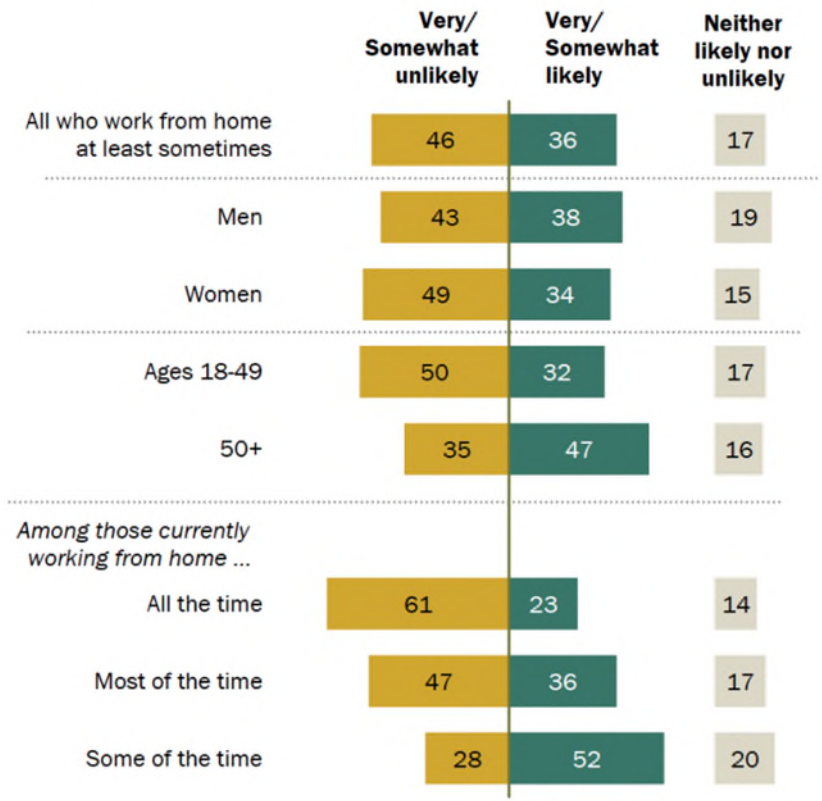
Return to office – but this time it’s for real

Factors to consider

- Constructive dismissal
- Potential Human Rights accommodations
- Employee morale

Nearly half of workers who currently work from home at least sometimes say they'd be unlikely to stay at their job if they could no longer do so

Among those who work from home at least some of the time, % saying they would be ____ to stay at their current job if their employer no longer allowed them to work from home



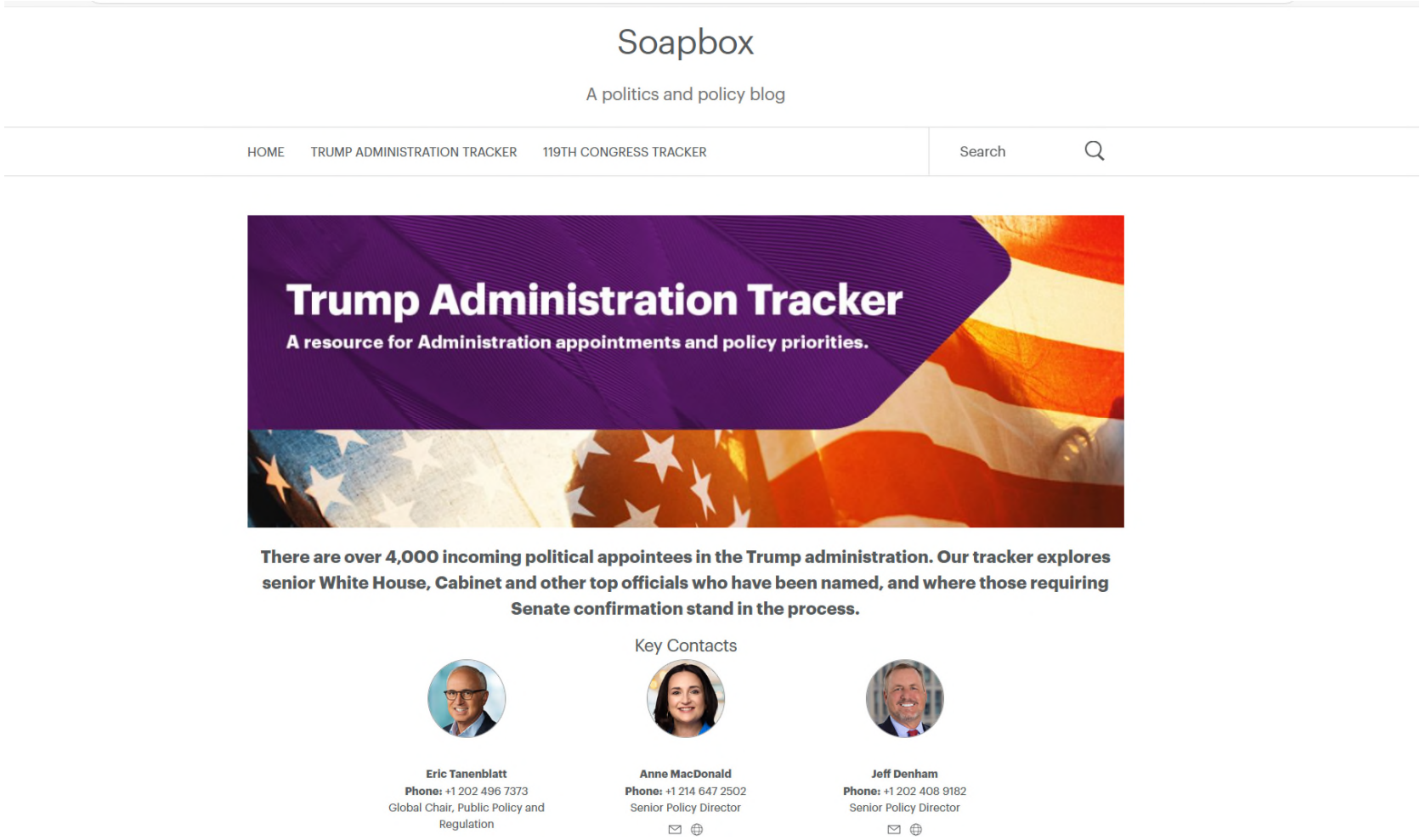
Note: Based on workers who are not self-employed and who say their job can be done from home. Shares of respondent who didn't offer an answer are not shown.
Source: Survey of U.S. workers conducted Oct. 7-13, 2024.

PEW RESEARCH CENTER

Managing employee speech in the workplace

- Private sector employees do not have a constitutional right to freedom of expression at work.
- Human Rights legislation in British Columbia, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, Yukon and the Northwest Territories prohibits discrimination based on “political belief”.
- Workplace harassment policies will continue to govern.

Dentons Trump Administration Tracker https://www.policysoapbox.com/



Thank you

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