The Latest Developments in the Law Governing BC Workplaces

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Overholt Law Client Seminar
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Introduction

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- Opening Remarks
- Agenda:
  - Legislative Updates
  - Managing the Workplace
  - Workplace Health & Safety
  - Q&A Session

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- The amendments to the BC *Labour Relations Code* and the impact on union organizing and applications for certification
- Sweeping amendments to the *Canada Labour Code*
- A review of recent amendments to the BC *Employment Standards Act*
- The significance of the new BC Human Rights Commission for Employers

LEGISLATIVE UPDATES

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Labour Relations Code

Labour Relations Code

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- After 8 months of consultations, the Labour Relations Code Review Panel released 29 recommendations for changes to the BC *Labour Relations Code* in October 2018

- Legislation amended in May 2019

Labour Relations Code

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- Various changes affecting the union certification process intended to reduce employer interference in unionization process, including:
  - Time limit for holding certification vote reduced from 10 calendar days to 5 business days
  - Broader powers for Board to impose remedial certification if it is “just and equitable”
  - Narrowed employer speech rights to statements "of fact or opinion reasonably held with respect to the employer's business"

Labour Relations Code

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- Highlights of changes affecting already unionized workplaces:
  - Increased efficiency in expedited arbitration
  - Successorship between contractors in building cleaning services, security services, bus transportation services, food services, non-clinical health services, and other services by regulation
  - Shortened timelines for decertification votes
  - Increase in maximum fines

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Canada Labour Code

Canada Labour Code

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- Big changes to the federal *Canada Labour Code* have been made this year and have come into force incrementally throughout the year

- The changes come after a report released by the federal government in August 2018 titled *What We Heard: Modernizing Federal Labour Standards* that called for modernization of the *CLC*

- Many changes came into force September 1, 2019 but others are yet to come into force until a date to be fixed by order of the Governor-in-Council

Canada Labour Code

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- Highlights that came into force on September 1, 2019 include:
  - Employees may now make written requests for flexible work arrangements after six consecutive months of continuous employment
  - Employees may refuse to work overtime if they must fulfil a family responsibility, under certain conditions
  - Various new, expanded, and amended leaves of absence

Canada Labour Code

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- Highlights that have not yet come into force but will in the near future include:
  - Overhaul of notice of termination of employment requirements to a graduated notice system
  - Requirements that part-time, casual, contract or seasonal employees may not be paid less than full-time employees unless a justifiable exception applies
  - Minimum age of employment increasing from 17 to 18 years old
  - New *CLC* workplace violence and harassment changes that will come into force in 2020

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Employment Standards Act

Employment Standards Act

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- From February 28 to March 31, 2019, the Provincial Government invited British Columbians to share their views on a number of proposed changes to the BC *Employment Standards Act*
- Followed the Employment Standards Reform Project – a public consultation from the BC Law Institute and a final report outlining a series of recommendations
- Various amendments to the legislation recently came into force in 2019
- Further amendments expected in the future

Employment Standards Act

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- Highlights:
  - Increase to recoverable wages from 6 to 12 months' wages, with the possibility of 24 month claims in "wilful or severe" cases
  - New statutory unpaid leave options related to critically ill family members, and domestic or sexual violence
  - Removal of the self-help kit process
  - Increased powers of the Director of the Employment Standards Branch

Employment Standards Act

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- Possible areas for amendment in the near future:
  - Changes to overtime requirements
  - Flexibility in the work week and shift scheduling provisions

- While the further amendments have not yet been tabled, they will likely address areas of the *ESA* that still require modernization to reflect the state of employment today

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BC Human Rights Commission

Human Rights Commission

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- The Provincial Government introduced amendments to the Human Rights Code in November, 2018

- The amendments created an independent human rights commissioner, who has the authority to **examine discrimination** in the province and **develop tools for educating** the public about combating inequality

Human Rights Commission

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- On September 3, 2019, Kasari Govender (formerly of the non-profit organization Westcoast LEAF) was sworn in at the Legislature as the first Human Rights Commissioner for the new Commission

- Ms. Govender will hold a 5-year term as Human Rights Commissioner

Human Rights Commission

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Commissioner and other intervenors

22.1 (1)The commissioner may, at any time after a complaint is filed, intervene in the complaint on terms a member or panel may determine having regard to the role and mandate of the commissioner under this Code.

Human Rights Code, RSBC 1996, c 210

Human Rights Commission

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- What does this mean for BC workplaces?
  - The Human Rights Commission will have an **educational function** that can benefit businesses and companies seeking to educate themselves on human rights practices
  - Employers may experience **investigations** conducted by the Commission where group or individual complaints are filed
  - The Commission may become involved as a party to human rights proceedings

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Developments in the law protecting against discrimination of persons with a mental disability

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- Developments in the law protecting against discrimination of persons with a mental disability
- Labour Relations and non-traditional employment relationships
- Social Media in the Workplace
- Recent developments in the law of constructive dismissal
- Punitive Damages, Aggravated Damages and Special Costs – how to minimize the risk of claims

MANAGING THE WORKPLACE

Developments in the Law: Mental Disability

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- Complicated issues arise with respect to an employer's duty to accommodate in the context of drug and alcohol addiction, which may constitute a mental disability

Developments in the Law: Mental Disability

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- Remember, once a disability is established, an employer has a duty to accommodate to the point of *undue hardship*
  - Accommodation efforts must be assessed globally
  - All accommodation during the employment relationship is relevant
  - The undue hardship test does not require the employer to show that it is "impossible to accommodate" the employee
  - The duty to accommodate ends where the employee is unable to fulfill the basic obligations of employment for the foreseeable future

Hydro-Quebec v Syndicat, 2008 SCC 43

Developments in the Law: Mental Disability

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- ***Cambridge Memorial Hospital v. Ontario Nurses' Association*, 2017 CanLII 2305 (ON LA)**
  - A 28+ year nurse was terminated for just cause after the employer investigated and found she had been stealing narcotics from work
  - The Union grieved her termination on the basis that she was suffering an opioid addiction
  - The Union argued that she should have been accommodated, not terminated

Developments in the Law: Mental Disability

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- ***Cambridge Memorial Hospital v. Ontario Nurses' Association*, 2017 CanLII 2305 (ON LA)**
  - The arbitrator upheld the termination, finding that, on the evidence, stealing the drugs was *not* a symptom of her disability
  - She could have come clean and sought treatment without engaging in theft
  - Her disability could not be raised as a defence to her misconduct

Developments in the Law: Mental Disability

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- ***Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses' Association*, 2019 CanLII 433 (ON LA)**
  - Nurse stole drugs from patients and falsified patient records to cover up; her employer terminated her employment for just cause
  - Unlike in *Cambridge*, the employer did not investigate before terminating her employment
  - The arbitrator ordered reinstatement; this employer failed in its duty to accommodate the nurse

Developments in the Law: Mental Disability

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- To avoid an adverse finding of discrimination on the basis of mental disability:
  - Assess each matter, taking into account all the medical information available
  - Consider the need for additional expert opinions
  - Engage in dialogue with the employee, Union, and possibly others about specific accommodations
  - Draft a plan which all parties agree is reasonable
  - Understand the scope of accommodation and when it's appropriate to discipline
  - Keep in mind the elastic and evolving nature of the duty to accommodate

Developments in the Law: Mental Disability

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- Accommodation of mental disability continues to be a delicate area of the law
- While the law in this area continues to develop, it is important that employers manage these claims on a case-by-case basis, paying particular attention to the evolving facts of each scenario

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Labour Relations and Non-Traditional Employment Relationships

Labour Relations and Non-Traditional Employment

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- Historical context for development of BC *Labour Relations Code*
  - 1973 creation of original *Code* at time where BC economy was characterized by employees based in large scale resource-based operations e.g. sawmills, manufacturing plants
  - Despite rounds of controversial substantive changes through the 1980s-2000s, fundamental labour relations principles remain

Labour Relations and Non-Traditional Employment

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- BC Labour Relations Code Review Panel noted a number of significant changes to the nature of work since the 1973 *Code* was created:
  - Demographic changes
  - Growth of non-standard work
  - Globalization and "fissuring" of the economy
  - Technological change
  - Growth of the service sector
  - Decline in union density

Labour Relations and Non-Traditional Employment

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- ON's 2017 *Changing Workplaces Review Report* noted the "significant number of vulnerable workers in precarious jobs", characterized by:
  - Temporary employment
  - Part-time or seasonal work
  - Unstable employment with little to no job security, low pay, and no access to pensions or benefits

Labour Relations and Non-Traditional Employment

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- Ongoing debate about labour relations and how it can address the modern workplace
- Recent developments suggesting expansion of rights to "non-traditional" employees
  - ***Heller v. Uber Technologies Inc.***, 2019 ONCA 1, leave to appeal to the SCC granted – arbitration clause found to be an illegal contracting-out of an employment standard
  - 2019 amendments to the BC *LRC* and *ESA*

Labour Relations and Non-Traditional Employment

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- Contrast with:
  - ***Janus v. AFSCME***, 138 S. Ct. 2448 (SCOTUS case from 2018) – overturning prior right of public sector unions to charge "agency fees"
  - In 2018, newly elected ON government rolling back amendments made by previous NDP government in 2017
- Future of labour relations laws unsettled
  - Still unclear how best to respond to sea changes in free trade, the economy, and technology

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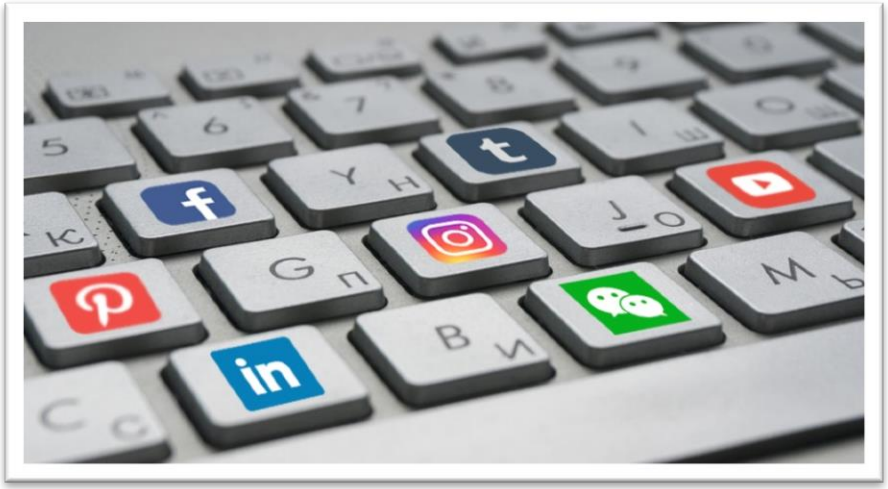
Social Media in the Workplace



Social Media in the Workplace

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- Employees can get in trouble by:
  1. using their employers' social media account inappropriately;
  2. using personal social media in a way that reflects negatively on their employer; or
  3. others linking the employees' personal social media to something that may negatively reflect on the employer

Employer's Account

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- Most direct avenue for liability
  - Employee using Employer's Social Media without authorization or Employee using Employer's Social Media with authorization; and
  - The posts reflect negatively on the company, i.e.:
    - Subject matter is unprofessional or in poor taste
    - Disparaging
    - Connotes a connection to causes not approved or damaging to the corporate brand

Personal Account

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- Grey area:
  - Does the Employee's social media directly state they are employed for Company X?
  - What is Employee's role?
  - Is the Employee identifiable publicly as associated with Company X?
  - Does the post reflect negatively on Company X because it expressly or implicitly refers to Company X?
  - Does the post reflect negatively on the employee such that Company X is negatively affected by association?

Recent Case Law

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- ***Kim v. International Triathlon Union***, 2014 BCSC 2151
  - Kim = ITU's Senior Manager of Communications
  - Duties included writing press releases, athlete biographies, web stories, the newsletters, working with the media, and being involved in ITU's social media
  - Made various disparaging posts about ITU members, employees, and events on her personal Twitter, Facebook and blog

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- *Kim v. International Triathlon Union*, 2014 BCSC 2151
  - Posts included a serious blog post titled “Taking Sh*t” in which Kim compared interactions with her boss to those she had during her life with an abusive parent
  - Tweets referred to Board members being hungover after a party and the company using “propaganda” at an event
  - ITU dismissed Kim on the basis of “cumulative cause” as a result of all of the posts

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- *Kim v. International Triathlon Union*, 2014 BCSC 2151
  - Kim sued for wrongful dismissal
  - Court found that the employer did *not* have cause for dismissal because:
    - ITU had **no social media policy**
    - ITU was aware of the posts over time and did nothing to stop her
    - ITU never warned her that her conduct was improper
    - ITU never provided her with a reasonable opportunity to improve

Links to Personal Account

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- Even more grey
- Involves third parties “tagging” employee’s social media account such that employee’s social media is associated with the source’s content
  - Is Employee aware?
  - Would the post negatively affect others view of Company Y given Employee’s association with it?

Links to Personal Account

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- Example:
  - Bob's social media references employment at Company Y
  - Bob's social media has posts about Company Y events and announcements, as well as purely personal posts
  - Bob's spouse Jenny posts a video clip on her social media account of Bob who was drunk in Mexico. She tags Bob's personal social media account in her post. Bob can be heard in the clip making a racist joke.
  - On Bob's social media, Jenny's post is visible among the posts about Company Y's events and announcements

Social Media Policies

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- Address interactions and comments by employees on social media sites*
- Define what is and is not considered "acceptable use" both on and off the company's network
- Be clear as to what disciplinary action will be taken, up to and including termination, if policies are not followed.

Best Practices

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- **Best practices regarding social media use:**
  - Set out expectations through company policies
  - Understand that not all behaviour will be able to be captured by a social media policy
    - Consider whether a broader off-duty conduct/morality policy is necessary or appropriate in the circumstances

Best Practices

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- Best practices regarding social media use:
  - Introduce policies at the time of hire
  - Enforce policies consistently and regularly
  - Review and refresh policies as the social media landscape changes

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Recent Developments in the Law of Constructive Dismissal

Developments in Constructive Dismissal

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- Definition of constructive dismissal:
  - a single unilateral act by the employer that breaches an essential term of an employee's employment contract; or
  - a series of acts by the employer that, taken together, show the employer no longer intends to be bound by the employment contract.

Developments in Constructive Dismissal

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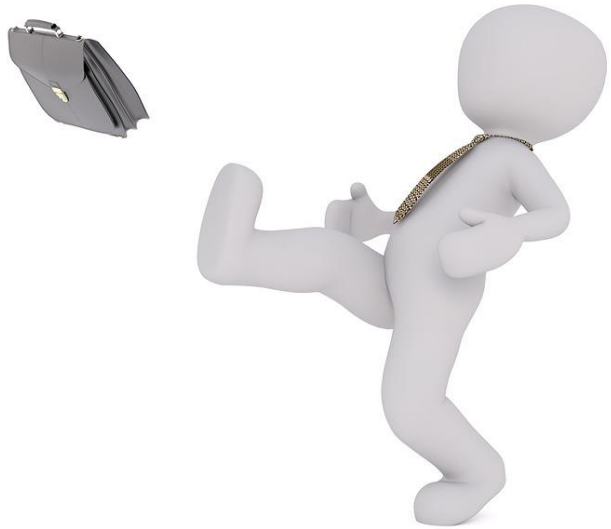
- What might constitute a constructive dismissal?
  - Demotion
  - Pay decrease
  - Substantive change in duties or reporting structure
  - Change in location



Developments in Constructive Dismissal

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- Recent ONCA cases show breadth of potential constructive dismissal claims:
  - An employer constructively dismissed a worker when it rehired a former manager who had sexually harassed the worker years earlier: ***Colistro v. Tbaytel***, 2019 ONCA 197
  - An employer constructively dismissed an employee when it suspended him without pay when he was being investigated by the police for workplace theft but had not been charged: ***Filice v. Complex Services Inc***, 2018 ONCA 625

Developments in Constructive Dismissal

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- To avoid constructive dismissal claims:
  - Check whether employment agreements include terms relating to the employer's right to unilaterally change terms of employment
  - Ensure any changes affecting employees are made for legitimate business reasons
  - Fully consider alternatives to any significant changes before, not after, instituting them
  - Confirm changes in writing with employees and provide employees with reasonable notice

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Punitive Damages, Aggravated Damages and Special Costs – how to minimize the risk of claims

Punitive Damages, Aggravated Damages and Special Costs

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- Aggravated Damages: used where the dismissal results in mental distress above and beyond the general upset caused by dismissal itself.
- e.g. ***Cottrill v. Utopia Day Spas and Salons Ltd.***, 2018 BCCA 383 aff'ing 2017 BCSC 704
  - 10+ year employee was given 3 months to improve performance; despite significant improvement, her employment was terminated
  - The Court found she had been set up to fail

Punitive Damages, Aggravated Damages and Special Costs

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- e.g. ***Cottrill v. Utopia Day Spas and Salons Ltd.***, 2018 BCCA 383 aff'ing 2017 BCSC 704
  - Employee gave testimony about her emotional distress, including crying after learning of the performance concerns and going "numb" after the termination of employment
  - At trial, she received $15,000 in aggravated damages as a result
  - On appeal, the Court emphasized that there needs to be evidence of mental distress beyond hurt feelings and set aside the award of aggravated damages

Punitive Damages, Aggravated Damages and Special Costs

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- Punitive Damages: used in exceptional cases to condemn or punish conduct that is harsh, vindictive, reprehensible and malicious
- e.g. ***Bailey v. Service Corporation International (Canada) ULC***, 2018 BCSC 235
  - Employee denied STD because he was dismissed suddenly while on medical leave
  - Employer claimed with cause termination because of his absence from work; the Court disagreed and found he was terminated without cause

Punitive Damages, Aggravated Damages and Special Costs

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- e.g. ***Bailey v. Service Corporation International (Canada) ULC***, 2018 BCSC 235
  - Court awarded aggravated damages as well as $110,000 in punitive damages because:
    - The manager who caused the employee mental distress was responsible for terminating his employment and dishonest about the reasons for termination
    - SCI knew he was suffering and chose to treat him cruelly
    - SCI's employment contracts had ungenerous termination clauses that allowed SCI to treat employees abusively when terminating their employment. SCI needed to be deterred from doing so

Punitive Damages, Aggravated Damages and Special Costs

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- Special Costs: Awarded where a party has engaged in reprehensible conduct
  - Contrast with Court awards of "party and party costs" which typically amount to 20-30% of the actual legal fees
  - Because aggravated and punitive damages are available to address pre-litigation misconduct, special costs are only awarded to punish reprehensible conduct in the course of litigation (***Smithies Holdings Inc v. RCV Holdings Ltd.***, 2017 BCCA 177)

Punitive Damages, Aggravated Damages and Special Costs

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- How do you minimize the risk of claims?
  - Make sure employment contracts are fair and reasonable from the beginning
  - Ensure that terminations of employment are carried out carefully and sensitively
  - Follow workplace policies and procedures
  - Clearly document the reasons for each termination of employment
  - Seek advice once a claim appears to be heading toward litigation to avoid missteps in the conduct of a proceeding

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- Violence in the Workplace – what is the Employer's responsibility?
- Respectful Workplace Policies and addressing bullying and harassment complaints
- How to defend claims of a toxic workplace environment and recent developments in the law in this area
- Recent developments in the investigation and response to sexual harassment complaints

WORKPLACE HEALTH AND SAFETY

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Violence in the Workplace – what is the Employer's responsibility?

Violence in the Workplace and Employer's Responsibility

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- **Provincial jurisdiction**: BC *Workers' Compensation Act & Regulations*
  - General duties regarding the health and safety of workers:
    - Employer duty to ensure the health & safety of all workers (*WCA* s. 115)
    - Worker duty to protect the worker's health and safety and that of colleagues (*WCA* s. 116)
    - Supervisor duty to ensure health & safety of all workers supervised by the supervisor (*WCA* s. 117)

Violence in the Workplace and Employer's Responsibility

OVERHOLT LAW
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- **Provincial jurisdiction**: BC *Workers' Compensation Act & Regulations*
  - "violence" includes attempted or actual exercise by a person, other than a worker, of any physical force so as to cause injury to a worker, and includes any threatening statement or behaviour which gives a worker reasonable cause to believe that he or she is at risk of injury (*OHS Reg* s. 4.27)

Violence in the Workplace and Employer's Responsibility

OVERHOLT LAW
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- **Provincial jurisdiction**: BC *Workers' Compensation Act & Regulations*
  - Employer must conduct a risk assessment if violence occurs (*OHS Reg* s. 4.28)
  - Once risks identified, procedures and policies should be developed to eliminate or at least minimize the risks (*OHS Reg* s. 4.29)
  - Employees need to be informed about potential risks of violence and hazards relating to their employment (*OHS Reg* s. 4.30)

Violence in the Workplace and Employer's Responsibility

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- **Federal Jurisdiction:** Bill C-65, which will amend the OHS provisions of the *CLC*, will come into force in 2020 and impose new employer duties with respect to workplace "harassment and violence", defined as:
  - "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment"

Violence in the Workplace and Employer's Responsibility

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- Employer duties under the proposed Bill C-65 amendments will include:
  - Employers conducting workplace assessments to identify risks of harassment and violence;
  - Implementation of preventative measures to protect against risks;
  - Preparing workplace harassment and violence policies;
  - Mandatory prevention training for employees

Violence in the Workplace and Employer's Responsibility

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- Whenever there is direct interaction between workers and the public, the potential for violent incidents exists.

- Employers have a legal responsibility to keep a safe and healthy workplace free from workplace violence

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Violence in the Workplace and Employer's Responsibility

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- **Risk Assessments**: When assessing the risk of violence, take the following into account:
  - The **location, nature,** and **circumstances** of the work you are engaged in;
  - Have you had any **prior incidents** of workplace violence in the past year; and
  - What are the experiences at **similar workplaces**?

Violence in the Workplace and Employer's Responsibility

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- **Reducing risk:** if an assessment demonstrates there is a risk of violence, you **must** develop and implement a workplace violence prevention program

- Should be part of your overall health and safety program

- Nature and extent based on results of the assessment

Violence in the Workplace and Employer's Responsibility

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- A violence prevention program **should** include:
  - Written policy to eliminate or minimize risk;
  - Regular risk assessments;
  - Prevention procedures;
  - Worker/supervisor training;
  - Procedures for reporting and investigating incidents;
  - Incident follow up; and
  - Program review

Violence in the Workplace and Employer's Responsibility

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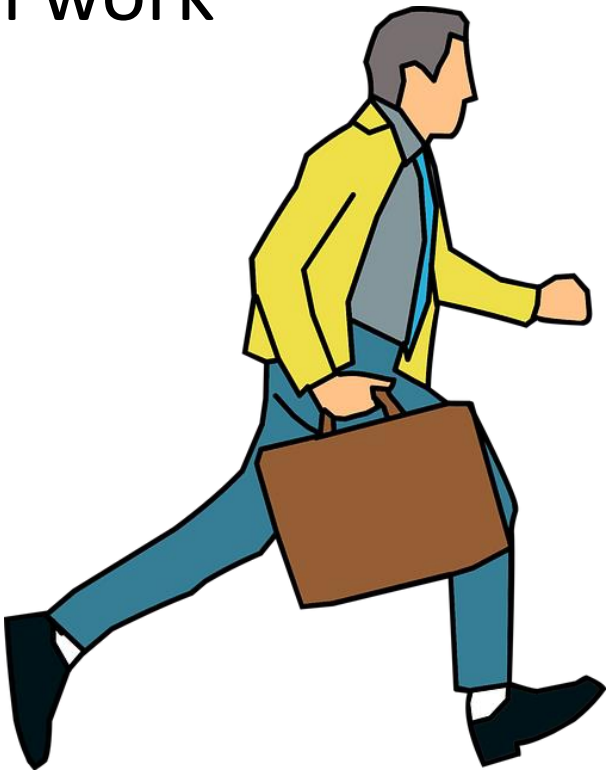
- Example of a prevention procedure: travelling to and from work



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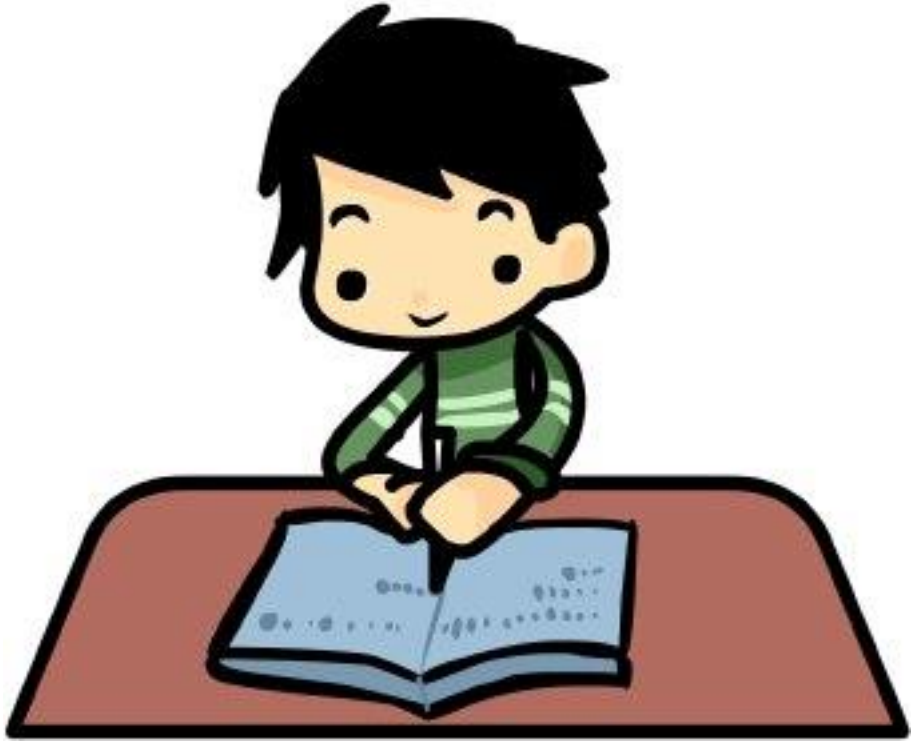
- Example of a prevention procedure: working alone



Violence in the Workplace and Employer's Responsibility

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- What about employee responsibilities?

- OH&S Regulation mandates numerous employee responsibilities, including a duty to report unsafe working conditions, a duty to refuse unsafe work, and a duty not to engage in improper activity or behaviour that might create a hazard to themselves or others

Violence in the Workplace and Employer's Responsibility

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- Domestic violence

1. If you learn of a threat, assess the risk
2. Eliminate or minimize the risk
3. Instruct your workers
4. Respond to any incidents

Violence in the Workplace and Employer's Responsibility

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- Reporting and Investigation

  – Immediately notify the Board of any accident resulting in serious injury or death of a worker

  – For any other injuries – or potential for injury – conduct workplace investigation

Violence in the Workplace and Employer's Responsibility

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Violence in the Workplace and Employer's Responsibility

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Respectful Workplace Policies and addressing bullying and harassment complaints

Respectful Workplace Policies and Bullying & Harassment

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- According to WorkSafeBC, "bullying and harassment":
  - *Includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated*
  - Requirement since Nov 1, 2013 under the *WCA* that all BC employers required to have a policy on workplace bullying and harassment

Respectful Workplace Policies and Bullying & Harassment

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- While distinct from workplace "violence" under the *WCA*, employers must fulfil similar obligations regarding bullying and harassment:
  - Develop a policy statement to prevent and address workplace bullying and harassment
  - Take steps to prevent or minimize bullying and harassment
  - Develop and implement reporting procedures
  - Develop and implement procedures for dealing with incidents and complaints

Respectful Workplace Policies and Bullying & Harassment

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- Employer obligations (continued):
  - Inform workers about the policy statement and steps taken to prevent or minimize bullying and harassment
  - Train supervisors and workers about recognizing, responding to, and reporting incidents and complaints of bullying and harassment
  - Annually reviewing the policy statement and procedures for reporting and dealing with incidents and complaints

Respectful Workplace Policies and Bullying & Harassment

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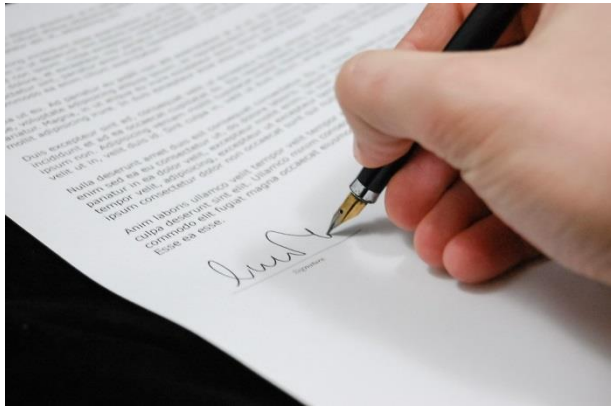
- Respectful Workplace Policy or Code of Conduct is a good starting point
  - Does it accompany a B&H policy that fulfils the employer's *WCA* obligations?
- What might this policy look like:
  - Conduct Statement
  - Definition
  - Rules/Direction
  - Application
  - Annual Review



WorkSafeBC Statistics (2018)

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- In 2018, WorkSafeBC received:
  - 3,585 general enquiries; and
  - 845 formal written complaints

  regarding bullying and harassment.

- These figures are the highest yet since the bullying and harassment amendment to the *WCA*

WorkSafeBC Statistics (2018)

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- In 2018, WorkSafeBC received 4,404 claims for compensation for a mental disorder caused by:
  - Significant work-related stressors (including bullying and harassment); or
  - One or more work-related traumatic events.
- Over ½ of the claims came from the Service Sector with the next largest sector being Transportation and Warehousing
- 1,516 of the 4,404 claims were allowed in 2018

Presumptive Clause (2018)

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- 2018 Amendment to the *WCA*
  - For workers in "Eligible Occupations" who have been exposed to work-related traumatic events and are diagnosed with a mental disorder as a result, the mental disorder is presumed caused by their work
    - Correction Officers
    - Firefighters
    - Police Officers
    - Sheriffs
    - Emergency Medical Assistant (e.g. paramedics)

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How to defend claims of a toxic workplace environment and recent developments in the law in this area

"Toxic Workplace Environment" Claims and Developments

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- Frequent use of "toxic workplace" and similar terms to describe a workplace in which an employee is unhappy or does not feel supported
- Important to distinguish between:
  - Workplace culture and "fit" that does not work for a particular individual
  - Work environments causing the departure of an employee in a manner that would constitute constructive dismissal

"Toxic Workplace Environment" Claims and Developments

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- ***Baraty v. Wellons Canada Corp*., 2019 BCSC 33**
  - The relationship between the plaintiff and his co-worker deteriorated as a result of various complaints and accusations, one of which included the co-worker swearing at the plaintiff
  - The plaintiff requested disciplinary action against his co-worker for disrespect, mistreatment and insubordination, as well as personal issues such as personal phone calls, typing loudly and burping

"Toxic Workplace Environment" Claims and Developments

OVERHOLT LAW
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- ***Baraty v. Wellons Canada Corp*., 2019 BCSC 33**
  - After the employer did not accede to the plaintiff's demands for discipline, the plaintiff felt slighted and eventually claimed he was being constructively dismissed
  - At issue in Court was whether this was a work environment giving rise to constructive dismissal

"Toxic Workplace Environment" Claims and Developments

OVERHOLT LAW
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- ***Baraty v. Wellons Canada Corp*., 2019 BCSC 33**
  - Court affirmed that the test for whether a workplace is toxic or "intolerable" is a "high one and is an objective one"
  - "Unfriendliness, confrontations between co-workers or even some hostility and conflict will not amount to constructive dismissal where the employee is still able to perform his or her work."
  - The employer acted appropriately by taking the complaints seriously, and the test was not met

"Toxic Workplace Environment" Claims and Developments

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- Even if the workplace isn't grounds for constructive dismissal, there may be a basis for a WorkSafeBC complaint
- To best address complaints of a toxic workplace environment:
  - Be proactive in addressing workplace disputes
  - Take complaints seriously and take time to investigate or mediate disputes
  - Review workplace policies and consider whether training or new policies are necessary

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Recent developments in the investigation and response to sexual harassment complaints

Developments in Responding to Sexual Harassment Complaints

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- In the wake of #MeToo, employers have looked toward improving their investigation of and response to sexual harassment complaints in the workplace
- Also important to consider the implications of sexual harassment complaints made after an employee has left employment

Developments in Responding to Sexual Harassment Complaints

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- ***Watson v. The Governing Council of the Salvation Army of Canada***, 2018 ONSC 1066
  - Ms. Watson's employment ceased in 2011 and she signed a full and final release in exchange for a lump sum payment
  - She released her employer from "any and all claims... past, present or future, known or unknown, which arise out of or which are in any way related to or connected with my employment or the ending of my employment"

Developments in Responding to Sexual Harassment Complaints

OVERHOLT LAW
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- ***Watson v. The Governing Council of the Salvation Army of Canada***, 2018 ONSC 1066
  - In 2015, the employer received a written sexual harassment complaint against a national director of operations
  - The employer investigated and received 8 different complaints of sexual harassment against the perpetrator, including one complaint by Ms. Watson

Developments in Responding to Sexual Harassment Complaints

OVERHOLT LAW
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- ***Watson v. The Governing Council of the Salvation Army of Canada***, 2018 ONSC 1066
  - After the investigation, Ms. Watson commenced an action against her employer and the perpetrator seeking damages for negligence, intentional infliction of emotional harm and breach of fiduciary duty relating to her allegations of sexual harassment
  - The perpetrator argued that the claim should be summarily dismissed because of the release

Developments in Responding to Sexual Harassment Complaints

OVERHOLT LAW
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- ***Watson v. The Governing Council of the Salvation Army of Canada***, 2018 ONSC 1066
  - The court said that "while many of the alleged events occurred at the place of employment and, perhaps, because of the employment, sexual harassment, intimidation and other improper conduct are not connected to the employment."
  - As a result, the claims fell outside the scope of the release

Developments in Responding to Sexual Harassment Complaints

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- Sexual harassment may not strictly arise "in the course of an employment relationship" and employees may still have a right of action in those circumstances
- Reminder that termination of employment release language is important
  - Ensure that the language covers statutory claims, common law claims, and potential human rights complaints

Q&A Session

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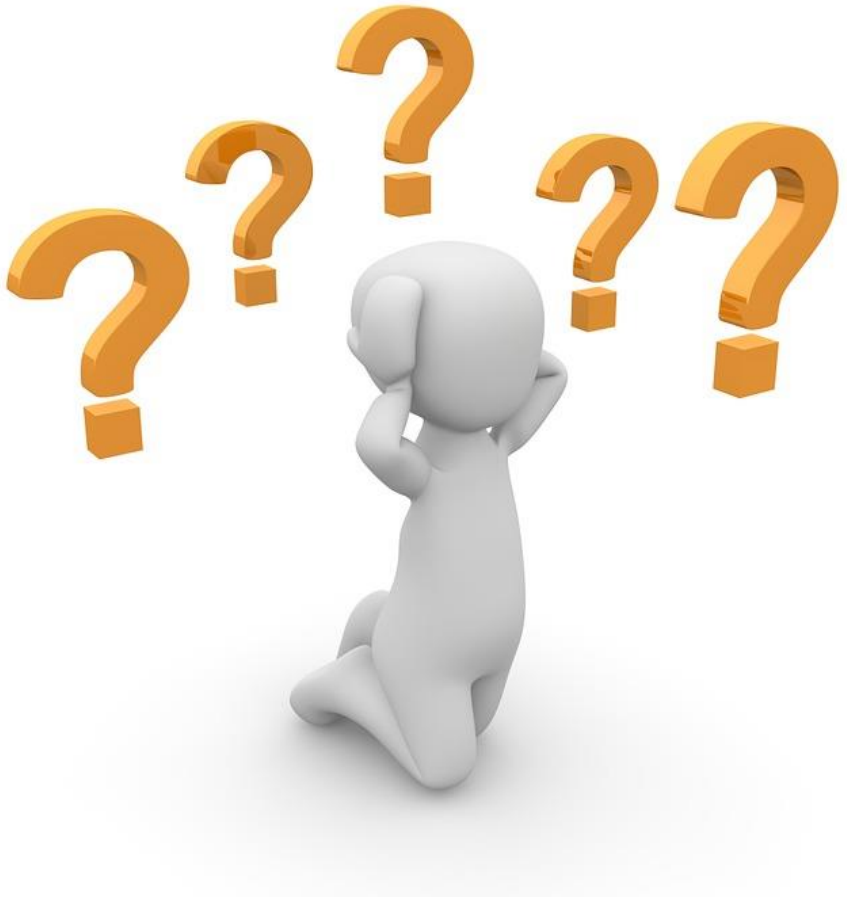

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