



### Your Checklist for 2022

And we thought 2020 was a doozy! In terms of continuing challenges, unprecedented questions and shifting legal landscapes, 2021 delivered. Between maintaining business continuity and keeping your workforce safe, we know there's been little time to track the rapidly changing employment law landscape in Canada. Here's a quick checklist to help you prepare for some of the most important developments in 2022.



#### If the Company is implementing a mandatory vaccine policy

- Look for pre-existing employment contract or collective agreement language authorizing the employer to require vaccination or other medical/clinical procedures
- Incorporate the COVID-19 Vaccination Policy by reference in the employment contract
- Ensure that the policy is tied to public health and occupational health and safety – the employer's legal duty to take "...every precaution reasonable in the circumstances..." to protect employees from COVID-19
- Seek input from workplace parties and the approval of the Joint Health and Safety Committee or safety representative – reduces the likelihood of complaints
- In the policy, include a definition of "fully vaccinated" in accordance with the Health Canada definition
- In the policy, address exemptions and accommodations for legitimate medical and other human rights issues and provide a defined process for pursuing/approving same
- Obtain employee consent to the collection, storage and use of: vaccination status; test results; and screening/quarantine
- Maintain privacy principles: disclosure on a need to know basis only; minimal health information disclosure; respecting the Personal Health Information Protection Act; prohibition of intra-employee communication about vaccination status



#### Federal Pay Equity Act

- Establish a representative pay equity committee
- Identify job classes and determine their gender predominance

- Evaluate each job class using a gender-neutral comparison system
- Compare job classes, normally using the "equal average method" or the "equal line method"
- Develop a pay equity plan within three years after the effective date of the act
- Post a notice stating the company's obligations under the Act (keep the notice posted until a final version of the plan has been provided to employees)
- Post a draft version of the pay equity plan for 60 days and allow for employee comments
- Consider a pay equity audit with legal counsel to get ahead of any issues
- Increase the compensation of predominantly female job classes that receive less pay than their male counterparts
- Maintain pay equity and review the pay equity plan at least once every five years
- Provide certain information to the internal pay equity committee and certain notices to employees
- File information (e.g. annual statements) with the pay equity commissioner



## Employment agreements

- Carefully draft employment agreements, specifically, the termination provisions, due to recent case law from the Ontario Court of Appeal
  - Valid termination provisions can be struck down if another termination provision is unenforceable. As such, termination provisions must be enforceable, both collectively and individually
- Understand that the sophistication of the parties and whether or not the parties obtained independent legal advice does not affect the legality of a termination provision
- Be aware that "clarifying/saving" clauses will not necessarily make an illegal provision acceptable
- Note that termination provisions can be unenforceable on the basis of repudiation
- Consider the following:
  - New agreements?
  - The end of "for cause" provisions?



## Constructive dismissal and Infectious Disease Emergency Leave (Ontario)

- To mitigate risk, include language in employment agreements that allows the employer to temporarily lay off employees



## New common law tort of internet harassment (Ontario)

- Be mindful of the importance of preventing and addressing harassment allegations, not only within the workplace, but also in the context of online and social media communications



## New right to disconnect (Ontario)

- Prepare a right to disconnect policy by June 3, 2022 (but hold off on drafting until government regulations are issued)
- Start thinking about:
  - Expectations about response time for emails
  - Encouraging employees to turn on out-of-office notifications when they aren't working
  - Ways of classifying employees for this



## Post-employment non-compete ban (Ontario)

- For Ontario, discontinue the use of employment contracts or other agreements that prohibit competition after employment ends (note that exceptions apply related to a sale of business and executives)
- Moving forward, review employment agreements, restrictive covenant agreements and bonus/equity agreements for prohibited language and to potentially strengthen the provisions which are still available to protect the business
- Work with counsel to determine if and when changes should be made Canada-wide
- Consider creative solutions such as agreements and plans that "incentivize" rather than "prohibit" non-competition



## Best wishes for a healthy and prosperous 2022

### Your Baker McKenzie Canadian Labour & Employment Team



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