OMHRA
Ontario Municipal Human Resources Association

ECHO

The Ontario Municipal Human Resource Association Newsletter

PRESIDENT'S MESSAGE

Rosanne Mantesso, OMHRA President

As I write my first President's Message, I can't believe it has been three months since I became the President of OMHRA at the Fall Conference. I am starting to settle into the role under the expert guidance of the Past President, Louise Ann Riddell, and Executive Director, Kandy Webb. I'd like to thank Louise Ann and Kandy for their support through the transition into my new role. I am very excited to work with the current OMHRA Board of Directors and welcome new Board members Samara Kaplan, Susan Farrelly, Michael Goldrup and Megan MacRae. In addition to new Board members, I would also like to welcome the new OMHRA Administrator Jessica Mann. Many of you may remember meeting Jess at the Fall Conference as she worked tirelessly alongside Kandy Webb ensuring everything ran smoothly. Welcome Jess!

A successful one day workshop was just held on benefit fraud and the feedback from members in attendance was extremely positive. Thank you to the members of the Education Committee - Jason MacLean, Susan Farrelly, Kerry Pletch, Jeanette Pillitteri, and Beverly Petheram, who along with Mark Mason from Hicks Morley put together a very informative workshop.

As 2018 fast approaches many OMHRA members are busy preparing to implement changes as a result of Bill 148 the *Fair Workplaces, Better Jobs Act, 2017*. Regulations are being drafted which may provide clarity to confusion surrounding the changes contained in the bill. Discussions are currently underway to hold one day workshops on Bill 148 and we will have more information to follow in the New Year.

The Education Committee is well underway with plans for the Spring Workshop to be held at the Hilton Fallsview Hotel in Niagara Falls. Mark your calendars on April 11 to 13, 2018 you don't want to miss it!

Thank you to Jennifer DiMartino, ECHO Editor for another excellent edition of the Winter ECHO.

With the holiday season upon us, take time to reflect on the past year, count your blessings so to speak and embrace the New Year with the enthusiasm you felt on your first day on the job! As Human Resources Professionals we have the best jobs in the world and make a difference every day.

Happy Holidays and all the best in 2018.

Rosanne

MESSAGE FROM THE EXECUTIVE DIRECTOR

Kandy Webb, Executive Director, OMHRA

As 2017 draws to a close, I sit in my office watching the first snow fall of the season and reflect on the changes OMHRA has undergone during the past year and those yet to come.

During 2017 Chrissy Shannon, Association Administrator left OMHRA to accept an exciting new role. Christine Ball, OMHRA Advisor, whose name has been synonymous with OMHRA for over two decades, will also be leaving OMHRA at the end of December to embark on a very well-deserved retirement.

Jessica Mann has joined OMHRA as our Association Administrator. Jessica provides administrative services including issuing job postings and Alerts and taking an active role in the provision of all OMHRA professional development offerings. Jessica can be contacted at customerservice@omhra.on.ca

In 2017 the OMHRA Board participated in a strategic planning session that identified objectives for the upcoming year. The objectives include:

- A review of the Labour Relations Information System (LRIS), analysis and possible implementation of enhancements recommended by the OMHRA membership;
- Development of an OMHRA Board succession plan;
- A review of the Sponsorship program.

2018 promises to be a busy, yet exciting year for OMHRA as we work on these and other priorities.

As a reminder, the OMHRA contact information has changed. Please pass these details to others in your organization that contact OMHRA, such as staff in your finance department:

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Please do not hesitate to contact me at any time if you have suggestions on how OMHRA can enhance your membership experience or if you have recommendations regarding potential new sponsors.

Mark your calendars for the OMHRA Spring Workshop that will be held April 11-13, 2018 at the Niagara Falls Hilton. We are currently finalizing the workshop theme and keynote speakers. Stay tuned for more information!!

I wish you and those you hold dear an enjoyable holiday season and a happy and healthy 2018!

Kandy

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BILL 148 IS NOW THE LAW – MAKE SURE YOU'RE PREPARED!

Stephanie Jeronimo & Julia Nanos, Hicks Morley Hamilton Stewart Storie LLP

On November 27, 2017, *Bill 148* – the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) received Royal Assent and became the law in Ontario. As a result, substantial changes have been made to the *Employment Standards Act, 2000 (ESA)* and the *Labour Relations Act, 1995 (LRA)*.

In this article we provide an overview of the key provisions of Bill 148, let you know when the provisions come into force, and highlight areas of concern for municipalities.

KEY CHANGES TO THE ESA:

IN FORCE NOVEMBER 27, 2017

Employee Classification

Bill 148 amended the ESA to expressly prohibit the misclassification of employees. This new provision is primarily aimed at the misclassification of employees as independent contractors. In addition, employers will have the onus to prove that an individual is an independent contractor and not an employee.

Municipalities should audit their use of independent contractors or other persons who are not classified as employees, as well as all documentation supporting the classification.

IN FORCE DECEMBER 3, 2017

1. Parental Leave

The length of parental leaves available has increased by a total of 26 weeks:

- from 35 weeks to 61 weeks for employees who took a pregnancy leave and,
- from 37 weeks to 63 weeks for employees who did not

Related amendments will adjust the timing of when parental leaves must begin and end to reflect the longer period of leave. These changes will bring the ESA into line with recent changes to the *Employment Insurance Act*. Significantly, the extended leave is only available where the date of the birth or the date that the child first comes into the custody, care and control of the parent is on or after December 3, 2017.

Municipalities should review any top up language found in policies or collective agreements, and consider if amendments or a Letter of Understanding are required to avoid increased costs as a result of employees opting to take an extended leave.

2. Critical Illness Leave

A new Critical Illness Leave replaces the "Critically Ill Child Care Leave." This new leave encompasses two basic entitlements:

- a leave of up to 37 weeks in a 52-week period for an employee to provide care or support to a critically ill minor child (i.e. who is under 18 years of age) who is a family member of the employee, and,
- a leave of up to 17 weeks in a 52-week period for an employee to provide care or support to a critically ill adult who is a family member of the employee.

The range of "family members" who can take the leave is broad. The provision also stipulates the conditions required to qualify for the leave. Related record-keeping obligations are also in effect December 3, 2017.

IN FORCE JANUARY 1, 2018

1. Increased Minimum Wage

There will be an increase to the general minimum wage to $14 per hour from $11.60 per hour. The other special minimum wage rates will increase by the same percentage.

2. Vacation with Pay

After five (5) years of service with an employer, an employee's vacation entitlement will increase to three (3) weeks (or 15 days) and 6% vacation pay. Municipalities will need to ensure their policies and/or collective agreements provide for at least this much vacation.

In addition, municipalities should review their record-keeping procedures to ensure the following new requirements are met:

- the amount of vacation pay an employee earned during a vacation entitlement year and how the amount was calculated,
- in cases of an alternative vacation entitlement year, the amount of vacation pay an employee earned during the stub period and how that amount was calculated.

3. Public Holiday Pay

The new formula for the calculation of public holiday pay divides the wages earned in the pay period immediately preceding the pay period of the public holiday by the number of days actually worked to earn those wages. This new calculation ensures employees are paid for the same number of hours they would typically work in one shift.

This means that if a part-time or casual employee works just one shift in the pay period preceding the pay period of the public holiday, they will be entitled to be paid the equivalent of one shift as holiday pay. As a result, paramedics working for more than one service could receive the value of multiple shifts for a single statutory holiday (paid by different employers).

In addition, for employees working on statutory holidays or in cases where the holiday falls on an employee's day off, the ESA will now require employers to provide employees with a written statement regarding their substitute holiday. The statement must set out the public holiday which the employee is working (or which is otherwise substituted), the date that is the substitute holiday and the date on which the statement was provided to the employee. Municipalities should consider creating a template to utilize in cases of holiday substitution.

4. Leaves of Absence

Bill 148 will result in the following changes:

(a) **Personal Emergency Leave** – the first 2 days of this 10 day entitlement will now be paid. In addition, Bill 148 prohibits employers from requesting a medical note to substantiate any claim for personal emergency leave. The exemption for employers with less than 50 employees is being removed. For municipalities that have integrated personal emergency leave days into existing leave policies, including contractual benefits entitlements, a review should be completed to determine whether changes are required, particularly with respect to requests for medical documentation.

(b) **Pregnancy Leave** – extended from 6 weeks to 12 weeks for employees who suffer a still-birth or miscarriage. The new rules only apply to leaves commencing on or after January 1, 2018. There is also a new definition of "legally qualified medical practitioner" which will include nurses with extended certificates of registration and midwives.

(c) **Family Medical Leave** – increased to 28 weeks within a 52-week period. The leave must be certified by a qualified health practitioner, and Bill 148 expands the definition of "qualified health practitioner" to include physicians, registered nurses with an extended certificate of registration (or an individual with equivalent qualifications) and prescribed health practitioners.

(d) **Crime-Related Child Disappearance Leave and Child Death Leave** – the current "Crime-Related Child Death or Disappearance Leave" will be divided into two separate leaves:(1) a Crime-Related Child Disappearance Leave, which will provide up to 104 weeks of leave without pay where a child disappears and it is probable that the disappearance was the result of a crime; and (2) a Child Death Leave, which will provide up to 104 weeks leave without pay for the death of a child for any reason. Employees must have been employed for at least 6 consecutive months to be eligible for either leave.

(e) **Domestic or Sexual Violence Leave** – this new leave entitles an employee who has been employed for at least 13 consecutive weeks to a leave of absence where that employee or the employee's child experiences domestic or sexual violence or the threat of sexual or domestic violence and the leave is taken for one of the following purposes:

- to seek medical attention for a physical or psychological injury or disability caused by the domestic or sexual violence
- to obtain services from a victim services organization
- to obtain psychological or other professional counselling
- to relocate temporarily or permanently
- to seek legal or law enforcement assistance, or
- any other prescribed purposes.

The leave is structured as a dual entitlement. In each calendar year, an employee may take up to 10 days of leave and may take up to 15 weeks of leave as well. The first 5 days of the leave must be paid in accordance with a new "domestic or sexual violence leave pay" calculation.

5. Overtime

The overtime provisions will be amended for employees who have two or more regular rates of work for the same employer. Bill 148 eliminates the blended overtime rate for employees who work different jobs at different rates for the same employer. Instead, Bill 148 establishes that overtime rates will be based on the rate of pay of the work being performed at the time overtime hours are accrued.

Municipalities will need to identify those employees working two jobs at different rates, and to ensure the hours of work for these employees is being appropriately tracked and compensated.

6. Record-Keeping Requirements

Several new record-keeping requirements have been added to the range of records currently required to be maintained by employers, including in relation to dates and times employees work or were scheduled to work or be on call, cancellations of shifts or on call periods, vacation pay and other matters. In addition, the retention period for records of vacation time and vacation pay will increase from 3 years to 5 years.

Municipalities should consult the text of the revised ESA for specific details.

7. Additional Amendments

There are a range of other changes to the ESA on January 1, 2018, including:

- amendments affecting temporary help agencies
- expansion of the related employer provision
- allowing for the use of electronic agreements
- removal of employee obligations upon filing a complaint
- increased penalties for non-compliance (primarily through increased amounts for notices of contravention and authority to publish more data on persons found to be in contravention of the ESA)
- more stringent wage collection measures, and
- a new ability for the Director of Employment Standards to provide and revoke “recognition” of employers who meet prescribed criteria presumably for compliance with the ESA

IN FORCE APRIL 1, 2018

Equal Pay for Equal Work

Bill 148 will enact a new provision that prohibits employers from paying different rates of pay to their employees because of a difference in employment status, where the employee performs substantially the same kind of work in the same establishment, the performance of the work requires substantially the same skill, effort and responsibility, and the work is performed under similar working conditions.

“Difference in employment status” means either (1) a difference in the number of hours regularly worked by the employees, or (2) a difference in their term of employment including a difference in permanent, temporary, casual or seasonal status. “Substantially the same” is defined to mean substantially the same but does not mean “necessarily identical.”

Wage differentials may only be justified through an objective system such as seniority, merit, when earnings are measured by production quality or quantity or any other objective factor or system that does not include sex or employment status.

Employees have a right to request a review of their rate of pay, without reprisal, and employers will be required to respond by either increasing the pay rate or providing a written explanation of the differential. Pay rate differentials cannot be addressed by lowering an employee's rate of pay.

Municipalities should take a proactive approach and conduct a job rate analysis to determine their risk. This would include determining whether the work of part-time, full-time and casual employees is the same and determining the reasons for different rates of pay for the same work. Municipalities should also consider the pay equity implications of any changes to job rates. It would also be prudent to develop a process to respond to employees who make inquiries regarding rates of pay.

If a collective agreement is in effect on April 1, 2018, that permits different pay rates based on employment status, the collective agreement will prevail over the ESA provisions until the earlier of (1) the date that the collective agreement expires or (2) January 1, 2020. A fulsome risk analysis will also assist municipalities in identifying collective bargaining issues to be addressed by January 1, 2020.

But there is some good news for municipalities! Thanks to the lobbying efforts of OMHRA and AMO, the Minister has advised that volunteer firefighters will be exempt from the equal pay for equal provisions. We anticipate that a regulation addressing this exemption will be issued in the near future.

IN FORCE JANUARY 1, 2019

1. Minimum Wage

There will be an increase to the general minimum wage to $15 per hour. The other special minimum wage rates will increase by the same percentage. Once the minimum wage reaches $15.00 per hour, the ESA will revert to its existing process of annual increases based on changes in the Consumer Price Index.

2. Requests for Changes to Schedule or Work Location

After three months of service, an employee will be entitled to request a schedule or work location change without reprisal from the employer. The employer must discuss the request with the employee and notify the employee of its decision within a reasonable time. If the request is granted, the employer must provide the effective date of the changes and their duration. If the request is denied, the employer must provide reasons for the denial.

Municipalities should establish a process for considering and responding to these requests, while ensuring that consideration is given to other legal obligations such as the *Human Rights Code*.

3. Scheduling

(a) **Three Hour Rule**
The three-hour rule in the ESA applies when an employee who regularly works more than 3 hours a day is required to present themselves for work, but works less than 3 hours, despite being available to work longer. The circumstances when the rule will apply remain unchanged

by Bill 148, however the Bill does significantly change the wages owed in these circumstances. Under the new rule employees will be entitled to the greater of:

- 3 hours of pay at the employee's regular rate, or
- the sum of (1) the amount that the employee earned while working, plus (2) the remaining time calculated at the employee's regular rate.

This means that if an employee earns overtime at 1.5 times their regular rate for the one hour they work, under the new calculation, they will be entitled to the equivalent of 4.5 hours pay.

The rule will not apply where the employer is unable to provide work due to fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work. The existing 3-hour rule from current ESA regulations remains in force until January 1, 2019.

(b) **Minimum On-Call Pay**

The Bill includes a new entitlement for minimum on-call pay. If an employee is "on call" and is either not called in or called in for less than three (3) hours of work, the employee will be entitled to three (3) hours of pay at their regular rate of pay, per 24 hour "on call" period. The value of that 3 hours of pay will be based on the same calculation set out above with respect to the three-hour rule.

Again, thanks to the lobbying efforts of OMHRA and AMO, Bill 148 contains an exemption that will apply to municipalities. If an employee is put on call for the purposes of ensuring the continued delivery of essential public services, i.e. fire, EMS, utilities, snow removal, etc, and the person is not required to work, then the rule will not apply. However, it should be noted that the rule will still apply where the employee is called in and required to work less than three hours (but were available to work 3 hours or more).

(c) **Right to Refuse Work**

Employees will be entitled to either refuse a shift or refuse being placed "on call," when the request is made with less than four days (or 96 hours) notice, without reprisal. The provision so that it will not apply where the work is to deal with an emergency, to remedy or reduce a threat to public safety, or to ensure the continued delivery of essential public services.

(d) **Minimum Cancellation Pay**

Employees will be entitled to 3 hours of pay at their regular rate when a shift is cancelled within 48 hours of its scheduled start. This obligation will not apply to situations where the nature of the employee's work is weather-dependent and the employer cannot provide work for weather-related reasons, or there are causes beyond the employer's control (e.g. fire, power failure, storms) for the cancellation.

(e) **Limitation on Payment, Transition Periods and Preparations**

Bill 148 specifies an employee is only entitled under these new provisions for payment for 3 hours in respect of one scheduled day of work or on call period.

If a collective agreement is in effect on January 1, 2019 that addresses on-call pay, a right to refuse work or be placed on call, or cancellation pay, the collective agreement will prevail over the ESA provisions until the earlier of (1) the date that the collective agreement expires or (2) January 1, 2020. These time frames mean that municipalities may be required to

renegotiate some of the scheduling provisions during the currency of their collective agreement, or have them overridden by the ESA's new rules.

Municipalities should review existing policies and/or collective agreements to determine if they already provide for these entitlements, and if so, how much is provided – taking into account the new rules for "3 hours pay" under these provisions. Municipalities may also want to consider if there are alternative scheduling practices that can be utilized to minimize the instances of short notice shift cancellations and requirements to have on call employees work for less than 3 hours (once called in).

KEY CHANGES TO THE LRA

All of the changes to the LRA will come into effect on January 1, 2018. For municipalities who are concerned about potential certification drives of currently non-unionized employees, these changes are important to review. These changes make it even more important for employers to obtain legal advice as soon as they become aware of a potential certification drive.

1. Employee Lists

Unions may now apply to the Ontario Labour Relations Board (OLRB) for an order directing an employer to provide with an employee list where the union can establish more than 20% support in the proposed bargaining unit, subject to certain conditions. Employers will be required to provide the union with employee names, phone numbers and personal email addresses, where this information has been provided to the employer. The OLRB will also have discretion to order the disclosure of other information. Both the employer and the union will have obligations concerning the confidentiality and security of this information.

2. Remedial Certification

Where the OLRB is satisfied that an employer has contravened the LRA, and as a result the union was not able to obtain 40% support, or if the true wishes of the employees were not likely reflected in a representation vote, the OLRB will now be required to automatically certify the union as the bargaining agent of the employees in the bargaining unit.

3. Expanded Just Cause Protection

Just cause protection means that Employees employers cannot discipline or terminate an employee except for just cause. Bill 148 expands these protections in two important ways. First, just cause protection will apply during the period that beings on the date on which a strike or lockout became lawful and ending on the date a new collective agreement is entered into. Second, employees will now have just cause protection from the date a union has been certified as bargaining agent.

4. Bargaining Unit Structure Review – Consolidation After Certification

Where a union already represents employees of the employer in another bargaining unit, the union or employer may request that the OLRB review the structure of the bargaining units. This is only available where a bargaining unit is newly certified, the review is requested at the time the application for certification is made or within 3 months of the certification, and a collective agreement has not yet been entered into. In these cases the Board may:

- order the consolidation of the bargaining units
- amend any certification order
- order that the collective agreement that applies to an existing bargaining unit applies to a consolidated bargaining unit
- declare that an employer is no longer bound by to an existing collective agreement where consolidation occurs
- amend the provision of a collective agreement, including expiry dates and seniority provisions
- determine the terms and conditions which apply until the collective agreement becomes applicable to the consolidated unit.

5. First Collective Agreements

The Ministry of Labour is now providing educational support in the practice of labour relations and collective bargaining where either party to a first collective agreement makes a request for such support.

A new process has been introduced whereby parties can apply for the appointment of a first collective agreement mediator and an OLRB-managed mediation process in every case. The party applying for first contract mediation would submit a list of the issues in dispute and its position with respect to those issues. The other party would then have 5 days to respond with its list of issues in dispute and its position with respect to those issues. Within 7 days of receiving the application, the Minister would appoint the first contract mediator, who would then meet with the parties to assist them in bargaining.

Once a mediator has been appointed, certain time limits apply to the timing of lawful strikes or lockouts, to when the OLRB may deal with decertification or displacement applications, and to when a party may seek the OLRB to direct the settlement of a first agreement by mediation-arbitration.

Finally, first contract mediation-arbitration is a process municipalities will be very familiar with – interest arbitration. No strike or lockout may take place where the collective agreement is being settled by mediation-arbitration, and any such strike or lockout that has already commenced must cease. Once a direction has been given for mediation-arbitration, the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice to bargain was given shall continue in effect until the first collective agreement is determined, unless a change was agreed to by the employer and trade union.

6. Additional Amendments

There are a number of other changes to the LRA on January 1, 2018, including:

- expanded successor rights for building service providers
- removal of the time limit to return from strike or lockout
- expanded remedial powers of the OLRB
- changes to vote logistics
- increased fines

Hicks Morley

Stephanie Jeronimo and Julia Nanos specialize in labour and employment matters facing municipalities. Hicks Morley is now regularly conducting on-site compliance and implementation planning meetings with our clients, and would be happy to assist your municipality to ensure you are in compliance with the many changes contained in Bill 148. If you have any questions about this or any other employment matter, or to arrange an on-site compliance planning meeting, please do not hesitate to contact Stephanie at 416-864-7350 or Julia at 416-864-7341. They may also be reached by email at: stephanie-jeronimo@hicksmorley.com and julia-nanos@hicksmorley.com.

LIFE EXPECTANCY IN GOOD HEALTH: A NEW LOOK AT RETIREMENT

Bill Winegard, Executive Director, MROO

In 2011, the average 65-year-old in Ontario could expect to live another 20.5 years to age 85.5. However, not all remaining years are the same as each other.

Health-adjusted life expectancy is the number of years in full health that an individual can expect to live given the current morbidity and mortality conditions. Health-adjusted life expectancy uses the Health Utility Index (HUI) to weigh years lived in good health higher than years lived in poor health. Thus, health-adjusted life expectancy is not only a measure of quantity of life but also a measure of quality of life.
StatsCan Table 102-0122, Health-adjusted life expectancy, at birth and at age 65, by sex and income, Canada and provinces

In other words, health-adjusted life expectancy is a technical way to measure what we all know to be true: our health and our quality of life tend to deteriorate as we get older. StatsCan gives us some new facts:

1. In 2006 (the most recent year available), StatsCan estimated the average remaining years in good health for a 65 year-old-male in Ontario to be 13.9 years, until age 78.9; for 65-year-old females 14.6 years, until age 79.6.
2. Good news: for 65-year-old males, it went up from 12.7 more good-health years in 2001 to 13.9 more in 2006. For 65-year-old females it went up from 13.6 more good-health years in 2001 to 14.6 in 2006
3. Not so good news: The average male in 2006 would experience 4.4 of his remaining years in less than good health; the average female 6.7 years in less than good health. (The number of average not-so-healthy years stayed quite consistent between 2001 and 2006; the not-so-healthy years just start later)

So what?

1. Your workforce

The average employee who retires now at 65 can expect about 15 years of good health. While they may not have quite the physical or mental bounce they used to have, they can still contribute. If they retire by choice in their 50s, they may have almost as many years for a second career as they did for their first career.

In 2018, the leading edge of the baby boom will be 71, with almost a healthy decade ahead of them, on average. The baby boom peak will turn 59….with luck, lots of good years left. If they like the job and they feel okay, why would they leave? On the other hand, the clock is ticking but is still only in the late afternoon of decent health, so why would they stay?

2. Retirement Residences

Retirement Residence operators tell us that the average age at which a resident moves into a retirement residence (such as Revera or Chartwell) is 82 or 83. On average in Ontario, the residents would therefore live 3 or so more years (and would already have experienced three or so years of less than good health before they moved in). A recent Toronto Star article cited retirement residence costs in Toronto of $4700/month and up, depending on the amount of daily assistance an individual requires. (Retirement residences - unlike long-term care facilities /nursing homes - are not subsidized.)

In a recent survey, MROO members reported future retirement home costs as one of their greatest financial concerns. They reported the impact of declining health as the factor that soon-to-retire employees most ignore but shouldn't. No wonder. If $45,000 is a reasonable estimate of all pension income (including CPP and OAS) for the average OMERS retiree, there's not much left over without selling the farm.

3. Health Costs

You have seen the stats about the present and future number of seniors. People are already challenged to afford retirement living. Huge numbers will soon be facing that challenge.
Is it any wonder that:

- the employer health tax is not disappearing any time soon
- successive governments have mused about using a means test to limit the increasing cost of the Ontario Drug Benefit for seniors
- private health insurers use age-banding and age-limits to contain costs (although the MROO health plan doesn't)
- all political parties are talking about huge increases in home care funding, in order to stem the tide of long-term care facility costs and chronic care hospitalization
- talk has started about public subsidy for some levels of care provided in resident-paid retirement homes
- a growing number are working longer in order reinforce their incomes against the future costs of health and retirement living.

4. Your Pension

Retirees living longer means pension plans paying more. At what point do today's pension formulas become unaffordable? At what point do active members bear too great a funding burden for the benefits of retirees? The impact of greater life expectancy on pension plans is well-known.

The impact of "Health -adjusted life expectancy" is less clear. On the one hand, the view of many economists (and the previous federal government) was that because people are living longer, they could and should work longer before becoming eligible for pension.

On the other hand, retirees know that life expectancy in good health is a whole different story. Making the best of their remaining good years is a precious opportunity. They may want to work longer because they like the work and see the rising costs of poor health coming down the track toward them. But they will hold hard to the choice that health and pensions allow them.

MROO | Municipal Retirees ORGANIZATION ONTARIO

MENTAL WELLNESS DURING THE HOLIDAYS

Cristina Myers, B.A., B.Ed., Director of Communications and Resource Development, TRAC Group

The holiday season is a busy time for most.

There is so much to do, attend and plan, which can bring up feelings of being overwhelmed, anxious, stressed, and depressed. Conversely, this is also a time where people may feel acutely aware of the void left by the loss of a loved one, and their own personal loneliness. Holiday depression, anxiety and stress can affect anyone at any age. Sometimes, these feelings are triggered by a specific event or life experience. There are many things happening around the holidays that can act as triggers.

1. Budget: There are many expenses during the holidays. Whether you are buying presents, food, or travelling, you may get in the habit of overextending yourself.
- Plan your budget in advance of the holiday season
- Only spend cash or use debit
- Don't try to buy happiness with a mountain of gifts
- Host a Secret Santa holiday event (where each person only buys one gift for a group of family or friends)

2. Family: Be realistic about what you can and cannot do when it comes to family. Set boundaries and communicate with your family. Try to accept family members and friends as they are, even if they do not live up to your expectations. Remember that others feel the stress of the holidays as well, so be understanding if others become upset or distressed when something does not go as planned.

3. Overindulging: Overall during the winter months our activity levels slow down while the opportunities to eat rich food and consume alcohol go up, which can lead to feeling unwell or feelings of guilt or shame. Take the time to plan your holiday schedule, and allow and create opportunities to be active. Be realistic with yourself – understand that your goal is to limit consumption or inactivity, not to eliminate it entirely.

4. Taking on Too Much: You may have over-committed yourself, or have unrealistic expectations of your abilities during the holiday season. Be sure to pace yourself and plan out your holidays – do not take on more responsibilities than you can handle. Cut out things that aren't truly important, prioritize important activities, share responsibilities of holiday tasks with others, and know that it is okay to say 'no'.

5. Loneliness and Isolation: loneliness and isolation can be a concern for many people during the holidays. Start a winter hobby or join a group to provide planned interactions; volunteer with a local non-profit organization; and watch for free holiday activities happening in your community. If you know you have a tough time during the holiday season, tell people to check up on you.

6. Loss: The holiday season can be a reminder of the loss of a loved one. Firstly, acknowledge that this holiday season won't be the same, and that is out of your control. Think about the things you do have control over – perhaps this is an opportune time to create new holiday traditions as a way to keep

your loved one's memory alive. Spend time with supportive and caring people who understand what you are experiencing.

7. Seasonal Affective Disorder: Seasonal Affective Disorder (SAD) is a type of depression that is related to the change in season. Symptoms include tiredness, depression, mood changes, irritability, difficulty concentrating, body aches, insomnia, overeating, and decreased interest in activities once enjoyed. Speak to a mental health professional in your community if you are experiencing these symptoms.

8. Year-End Reflection: As 2017 comes to a close, many reflect on what has changed and what has stayed the same over the last year. Take note of things that have gone well, and that you have done well. Give yourself credit, and look to the future with optimism. Do not set New Year's resolutions which can add unnecessary pressure on yourself.

Resources: **http://www.cmha.ca/**

MEDITATION MINUTE

In the lead up to the holidays, start practicing meditation once every day. Mindful meditation means paying attention on purpose and without judgement when we look at our thoughts and feelings. Most enjoy and get the most out of meditation when doing it at the very beginning or end of the day.

Many of us are on autopilot for most of the day. We are working, helping family, handling responsibilities, etc. and not taking time to check in with ourselves and how the day has impacted us. Without checking in, our stresses can build and build until suddenly the stress has compounded. Simply taking 10-20 minutes per day to slow down and ask ourselves how the day has impacted us and how we are feeling can mediate the pile up of stress.

Remember that it is okay to feel stressed, angry, down, or worried. Take the opportunity to explore why you feel those emotions in a curious and non-judgmental way to try to understand yourself better.

To get the most out of meditation, find a time and place in your day when you can shut off your phone, sit down comfortably, and close your eyes without external distractions. You can let your mind wander, but once you realize it is wandering into your to-do list, acknowledge this and then consciously bring yourself back to your feelings and emotions in the moment.

WHAT'S NEW IN 2018 – MROO HEALTH, DENTAL AND ANNUAL TRAVEL PLANS

Holly Ewing-Murphy, Vice President Retiree Benefits, ENCON Group Inc

OHIP benefits are good but they can fall short of the health care coverage that some people may need in retirement. For your employees who are planning to retire this year, health care coverage needed over and above that provided by OHIP may not be top of mind; but for many, a private plan will be essential to offset unexpected health care costs that are not covered by a provincial plan.

The MROO Health and Dental Care Plans with optional Annual Travel renew on January 1, 2018. This year, we have made several plan enhancements to keep pace with the changing needs of MROO members in retirement; some improvements are reflective of the feedback we have received from MROO policyholders.

Enhancements to the MROO Health and Dental Care Plans for 2018 include:

- Psychologist - benefits increasing to $500 per person annually and the per visit maximum increasing from $40 to $50 per visit. We are removing the $20 maximum per ½ hour initial assessment visit.
- Accidental Dental – adding coverage for artificial teeth and dentures.
- Ambulance - removing the $4,000 annual maximum for air transportation.
- The ambulance benefit will offer unlimited land and air ambulance service in Canada to the nearest hospital which has adequate facilities for the treatment of your sickness or injury.
- Major dental services – adding coverage for dental implants up to an amount equal to the least expensive cost of a denture or bridge. MROO members have been asking for this plan improvement for several years. This is a benefit that most insurance companies are not offering in their retiree plans; however, we are pleased to announce that we are adding this coverage for 2018.

Know Your Benefits Under OHIP – Ambulance Services

If you don't have private health insurance, you need to be prepared for the possible cost of ambulance services. These costs, particularly air ambulance, can be expensive and are not always covered by OHIP. Coverage for ambulance trips originating out-of-province can be very expensive.

OHIP recommends that residents purchase a health care plan or a travel plan with ambulance coverage.

Do you know that you are responsible for the full cost of the land and/or air ambulance services when the trip begins out-of-province? Coverage for ambulance trips originating in Ontario is reasonable.

If a physician deems the ambulance trip to be medically necessary and the service begins and ends in Ontario, you pay only a co-payment charge of $45.00.

Your ambulance transportation costs are fully covered if a physician deems your ambulance service **medically necessary**, your trip originates at an Ontario hospital or health care facility, and your destination is a hospital or health care facility outside the province but **within Canada.** This coverage is provided only **when treatment is not available anywhere in Ontario**.

Your ambulance transportation costs are fully covered if a physician deems your ambulance service **medically necessary**, your ambulance trip originates at an Ontario hospital, and your destination is a hospital or health care facility **outside the country**. You must have received prior **approval** from OHIP for the out-of-country medical treatment, and the treatment must not be available anywhere else in Ontario.

You are responsible for an ambulance co-payment charge of **$240.00** for each land ambulance service rendered, and/or the **actual cost** for each air ambulance service given if a physician deems your ambulance service **medically unnecessary** and your ambulance trip originates in Ontario, regardless of destination.

Government health care services are limited and vary across Canada. And coverage can change at any time. This is why you might want to consider a private insurance plan, such as the MROO Health and Dental Care Plan. It is designed to start where your provincial coverage ends and, once enrolled, you can keep your benefits for life.

For more information about MROO benefits including travel plans for emergency medical coverage worldwide, please visit http://www.encon.ca/mroo or call ENCON Group Inc. at 1-800-363-7861. You can also email ENCON at mroo@encon.ca.

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Are Your Employees Retirement Ready?

In partnership with MROO, ENCON Group Inc. has been providing post-retirement benefits services, including plan design, distribution and administration, for over 30 years.

- Health and Dental Benefits / Annual Travel Insurance
- Guaranteed Issue Life Insurance
- Convalescent Care
- YourNurse
- Alliance Pharmacy

When employee-sponsored benefits end, we help bridge the gap in benefit coverage with our comprehensive approach to healthcare and insurance.
For more information, contact one of our Client Service Specialists at 1-800-363-7861 or by email at mroo@encon.ca.

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MROO | Municipal Retirees ORGANIZATION ONTARIO

SIT-STAND WORKSTATIONS – WHEN AND WHY SHOULD THEY BE CONSIDERED?

Marnie Downey, R.Kin., M.Sc., Certified Canadian Professional Ergonomist (CCPE), President, ERGO Inc.

Over the last several years, the media has been focusing on how prolonged sitting at work can negatively impact one's health. This has led to an increase in sit-stand workstation designs, and employees requesting standing desks. However, recent research has been pointing to the fact that standing can actually be worse than sitting. So what is the truth, and what are employers and employees to do?

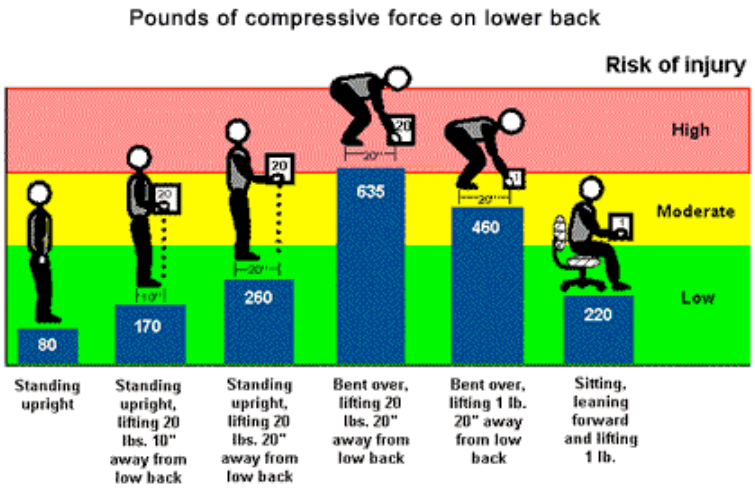
What does the research say about prolonged sitting?

Over the years, office work has become increasingly sedentary. We often think the physical activity we do outside of work can help minimize the effects of too much sitting at work. However, research has found that an individual's physical activity level does not provide the benefit we hope. Independent of physical activity, prolonged sitting has been linked to a significant risk of diabetes and cardiovascular disease. Significant sedentary time has also been linked to obesity and even premature mortality.

From an ergonomics point of view, prolonged sitting, in an improper fitting workstation chair, can increase an employee's risk of developing low back pain. Poor back posture increases the pressure on the intervertebral discs in the spine. Over time, this can lead to wear and tear of the discs, and in some cases, a disc protrusion (or "slipped disc") can place pressure on the nerves in our back. Refer to the diagram below to see how sitting in different postures affects spinal disc forces.

What does the research say about prolonged standing?

Prolonged standing has been known for a long time to contribute lower leg and low back discomfort, as well as an increase in a worker's overall fatigue. With prolonged standing, blood pools in the lower limbs, which causes an increase in venous pressure. The heart has to work harder to pump this blood from the lower limbs back the heart. This is one reason why it is more fatiguing to stand. However standing is not all bad. Standing results in lower compressive forces on the spinal discs than does sitting, as shown in the diagram below.

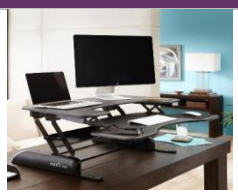


What is the Solution?

So with the knowledge that there are risk factors associated with both prolonged sitting and prolonged standing; what are we to do? The key is that we encourage and allow workers to not spend prolonged periods of time in any one posture. Movement is healthy and should be built into job tasks to ensure a healthy work day. Static standing and static sitting should be minimized by changes in posture. One way to build posture change into an office employee's day is to provide them with a workstation that can be adjusted for both sitting and standing. Of course, there are other ways to achieve change in posture and not all employees require a sit-stand workstation. Employees that have jobs with varying tasks that allow them to walk and stand throughout their day likely do not require a sit-stand workstation.

What type of sit-stand workstation should I choose?

Once the decision has been made to purchase a sit-stand workstation, employers are asking questions about how to select the right model. As with most things in life, one size does not fit all. Selecting the right style and model of sit-stand workstation will depend on the employee's stature and the type of work that they do. Be sure to measure the employee's seated and standing elbow height to ensure that the selected model's keyboard platform / location will adjust to fit the employee's size. For some desk mounted units, you will need to know the size, number and style of monitors (and/or laptop) to ensure the correct mounting hardware is available for the screens. If employees use a telephone or review paper documents regularly, ensure the unit you select will accommodate these tasks. Ask your product suppliers if they can provide you with a demo unit. Research suggests that there is some novelty to a sit-stand desk, and that some employees may decide they prefer to sit after a trial.

Desk mount (adjusts above & below the desk surface)	**Desk mount** (adjusts above the desk surface only)	**Fully adjustable desk**
		
Pros: • Adjusts below the desk surface to allow short and average height employees to sit with the feet flat on the floor without the use of a footrest	Pros: • Flexible positioning of monitors, phone, and paperwork because of the larger adjustable work surface	Pros: • Desk can be positioned lower than a standard desk allowing short and average height employees to sit with the feet flat on the floor • Allows height of paperwork and tools to be adjusted easily
Cons: • May lack sufficient vertical range for tall employees (tall kits available) • Limited flexibility over monitor positioning • Limited space for paper work and other equipment	Cons: • Renders the top of a standard desk ½ - 1" higher, making the surface too high for many employees (a footrest will be required)	Cons: • Some units may lack sufficient vertical range for taller employees • More costly than desk mount options
Units to consider: • Ergotron WorkFit-S	Units to consider: • Ergotron WorkFit-T • Varidesk Pro Plus • Humanscale Quickstand	Units to consider: • ergoCentric upCentric • Ikea Bekant

Remember that for most employees, sit-stand desks are a “nice to have” and not a “need to have.” There are many other ways to incorporate more movement into our days without buying sit stand desks for everyone. Consider the following:

- Use the dynamic tilt function of the chair.
- Take telephone calls in standing when simultaneous computer work is not required.
- Walk to talk to a colleague rather than sending an email.
- Use a standing height counter or desk and have standing meetings.
- Take a couple of minutes to stretch for every 30 minutes of keying/mousing.

For further assistance with Office Ergonomic Assessments or Training please do not hesitate to contact ERGO Inc.

ERGO

www.ergoconsulting.ca
Email: info@ergoconsulting.ca
Head Office: 705.436.4504

MAKING A CASE FOR THE DIGITAL TRANSFORMATION OF MUNICIPAL LEARNING & DEVELOPMENT

Susan Shannon, Founder & Principal of muniSERV.ca.

The digital transformation of municipalities has morphed over time from simply being a trendy "buzz word", to becoming a central component of a modern municipal business strategy. Fortunately, government leaders are really starting to leverage modern technology to implement and improve administrative best practices.

"Smart governments integrate modern technology into their day-to-day operations to enhance engagement with citizens and other stakeholders to drive better outcomes – And, better technology improves public administration."[1]

Modern technology is revolutionizing and transforming all aspects of public administration – everything from the way you manage your public works and assist citizens, to the way you administer your learning and development programs.

An LMS is a software application that helps organizations manage the administration, documentation, tracking, training and reporting of their Learners. It reduces the time, effort and cost of training programs while offering deeper insight into your Learner's experience, compliance and progress. The number of organizations that now use learning management systems (LMS), is higher than ever before and digital learning and training is becoming more widely accepted and used.

That's why it's hard to understand, with all the proven efficiencies and benefits of using LMS software and digital learning, why some learning and development professionals still consider expensive, face-to-face, instructor-led training preferable to digital learning?

So, here's a case for going digital:

[1] The Digital Transformation of Public Administration - OpenGov

It Breaks Down Silos – Different departments often use different systems resulting in decentralization and "everybody doing their own thing" with training and development. Centralizing your learning and development programs by using an LMS, eliminates the decentralization that results in scattered data across multiple municipal departments and improves management analytics and reporting so more informed decisions can be made.

It Eliminates Spreadsheets - Spreadsheets and legacy systems are unwieldy processes that lead to increased errors and a limited ability to track and monitor training, which ultimately results in frustration.

Produces IT Savings - On-site software requires in-house IT resources and expensive IT ongoing maintenance. It needs to be updated continually - plus it's difficult to access information across departments and away from the office.

Using cloud-based software and Software-as-a-service (SaaS), eliminates the time spent on installations and manual software updates, while at the same time providing a more cost-effective solution that saves time and provides online data centers with far greater computer power and storage capacity.

You Can Do More with Less - Transforming your learning programs to digital learning simply allows you to deliver more training to more learners at less cost. It stretches training budgets because it reduces training costs (less travel, time away, travel expenses etc.)

Deliver consistent learning across your organization, anywhere, anytime – Maybe you need to deliver the same compliance course to various departments in your municipality at the same time? An LMS and digital learning makes this easy.

Adopting digital learning lets your team obtain certifications such as PMP, Change Management, Risk Management and more – right from their desktops - at a fraction of the cost of traditional classroom learning to acquire the same certifications.

Puts you ahead of the curve in your ability to entice younger workers - many of them are quite used to digital learning already.

It's predicted that over the next 5 years, 51% of senior municipal staff members employees will be eligible to retire. Therefore keeping the current workforce engaged –millennials, generation Xers and baby boomers included – is essential to the success of each municipality. When you create a modern digital workplace and give employees tools to help them do their jobs it helps drive employee engagement, which keeps more young professionals in local government.

Establishes the right learning opportunities for tomorrow's leaders – You can create Learning Paths and Learning Objectives within an LMS to ensure you are helping shape tomorrow's leaders.

Improved control over the creation, deployment and management of your own training initiatives and staff development.

And More……

As digital technology continues to evolve successful digital transformation will require careful collaboration, thoughtful planning and the inclusion of every department.

However, digital transformation isn't only about technology, it's about meshing the power of technology with a corporate culture that embraces the change technology can lead for the organization.

Any learning initiative needs employee buy-in and the support of upper management. And often organizations need assistance to help them create a strategic roadmap to guide them through their digital learning and development transformation.

We wanted to know why municipalities have been slow to adopt new technology to transform their learning and development programs so we conducted a survey in 2017. What we learned was, that while municipalities would like to have an LMS, purchasing their own LMS software is a huge capital outlay that is simply cost-prohibitive for many municipalities. In addition, we heard that those municipalities who already have their own LMS have a hard time sourcing quality, accredited training. So, we developed **muniLEARN** – a collaborative learning management solution for municipalities that's intended to be an end-to-end solution to help them as they navigate through their learning and development transformation and digital learning.

muniLEARN is a robust, secure, turn-key learning platform that lets you manage the deployment of your own learning and training initiatives ***- digitally, in a cost-effective manner***.

If you're considering transforming your learning and development program, Click here to try our **free needs assessment** tool to check your readiness to transform, or contact us at info@muniSERV.ca for:

- More information about muniLEARN and/or a **free introductory demo** for your team
- How your municipality can participate in our free **Pilot Program** to test drive using an LMS and digital learning

Remember, Learning Isn't Where You are, It's What You Do!

muniSERV

SUPPORTING MENTAL HEALTH MATTERS

Carrie Deon, Human Resources Generalist, Mohawk College Enterprise

According to the Centre for Addiction and Mental Health (CAMH), mental illness is a leading cause of disability in Canada. There has been so much attention given to the subject that an entire week every October is dedicated as “mental health awareness week.” This brought a lot of great discussion around the taboo subject in the workplace, and how employers and employees can work closely together to address mental health.

According to CAMH, in any given year, one in five Canadians will experience a mental health or addiction problem. By the time Canadians reach 40 years of age, one in two have – or have had – a mental illness. As an employer you might ask yourself, “what can I do to support my employees?” First, don’t brush it under the rug! Listen, support, accommodate and have open dialogue. Second, don’t diagnose. Employers should refer employees to the appropriate supportive services. Third, develop organizational awareness through training. Educate managers on how to supervise employees with sensitivity and coach staff on basic awareness to promote a stigma free workplace. Lastly, develop a mental health strategy. This Globe and Mail article recommends that you set clear objectives and focus on the 5 “R’s”: removal of stigma, resilience building, recognizing risk, recovery and return to work.

Implementing and maintaining a psychologically safe workplace can be an overwhelming undertaking for any organization. CivicAction’s MindsMatter is a great assessment tool to help you quickly identify where your organization is at supporting employee mental health, and what your organization can be doing to better support them. This is particularly important as CAMH also says 39 percent of Ontario workers indicate that they would not tell their managers if they were experiencing a mental health problem.

Employees also have a responsibility when it comes to supporting mental health. First, they need to be accountable for their own well-being. This may include speaking to a professional such as their family doctor or accessing services through an employee assistance program. CAMH noted that Ontario wait times for therapy can be as long as six months to one year. This makes it even more important for the employee to be proactive and take personal steps to understand what they are experiencing and to communicate this with their employer. The employee should organize a private time to speak with their manager or human resources department and be prepared to provide a framework of their situation. By clearly articulating their needs, managers and human resources professionals will be better able to understand the issues and help with the development of an action plan. Employees should be prepared to discuss what symptoms they are experiencing, how the symptoms are affecting their work, whether or not they have sought medical treatment and what accommodation(s) they may need. Employers can offer this quiz from the Canadian Mental Health Association to their employees to help them reflect on their individual, unique strengths, and identify areas where levels of mental fitness could be improved to help cope with life's up and downs. Organizations can use this tool to help employees self-identify personal challenges before it leads to a larger problem. Think about discussing those results during regular touchpoint meetings to review strengths and mutually develop an action plan for areas of weakness.

We may be moving in the right direction since a CAMH study showed that 57 percent of respondents believe that the stigma associated with mental illness has been reduced compared to 5 years ago.

Together, employers and employees can work openly to address mental health. While accountability on the part of the employee is important, organizations can additionally provide a stigma free environment through awareness, encouraging open dialogue and providing support.

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MOHAWK COLLEGE ENTERPRISE

BUILDING TRUST IN THE WORKPLACE

Audie McCarthy, President and CEO, Mohawk College Enterprise

According to Steven R. Covey, “trust is the glue of life. It’s the most essential ingredient in effective communication. It’s the foundational principle that holds all relationships.” Trust is both a feeling you have in a person and a skill they possess to make you feel that way. In creating successful relationships, it is an essential quality both parties should possess.

Edelman’s 2016 Trust Barometer discovered that nearly one out of every three employees do not trust their employer. The impact on organizations? A study by the Interaction Associates says that high trust organizations are 2 ½ times more likely to be a high performing organization when it comes to revenue than low trust organizations. Without trust in the workplace, organizations cannot create the environment necessary for meaningful feedback or for growth potential.

Now that we know how important trust is in the workplace, how do we put it into practice? Building trust starts with identifying and maintaining a strong set of core values.

Always remain accountable

As mentioned earlier, trust can be seen as a feeling and also a skill, but how many times have you seen “trustworthy” under the skills/competencies list on a resume? The skill side of trust is often undervalued and underappreciated in the workplace. If someone regularly gets the job done, but is not transparent, do you trust them? Conversely, if someone communicates openly, but regularly fails to finish their work, how much do you trust them? Remaining accountable means you have to communicate openly and follow through on your actions, not one or the other.

Honesty is always the best policy

How many times have you tried to soften the blow of bad news by not being completely honest with your team? In not being honest, you add no value to the conversation and your listener can end up misled and misinformed. It can be hard to deliver bad news or have an uncomfortable conversation, but it will earn you more respect amongst your team.

Admit your mistakes when wrong

Admitting your mistakes can be a powerful thing. When we try to justify why something went wrong or cover it up, we create suspicion. Mistakes are not something to hide from, they are learning experiences

that help us grow. Create transparency by identifying the mistake, admitting to it, learning from it and moving on.

Mean what you say and say what you mean

Sometimes we try to spare a person's feelings by dancing around a subject or saying something unintentionally misleading. While it may be difficult at first, remaining diplomatic while speaking your mind will help you build trusting relationships. People may not always agree with what you have to say but they know they can rely on you for an honest opinion.

Sticking to your values takes continuous and conscious effort; but in doing so, you establish yourself as a trustworthy leader – no matter where you are on the corporate ladder.

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905-575-2525

MOHAWK COLLEGE ENTERPRISE'S 50TH DELIVERY OF FUTURE READY LEADERSHIP

On November 22, 2017, Mohawk College Enterprise celebrated the 50th delivery of our signature training program, Future Ready Leadership. The very first delivery was in 2011 with the Town of Innisfil and had participants from Innisfil Hydro, Tay Township, Town of Bradford, Town of Bradford West Gwillimbury, Town of Innisfil, Town of Wasaga Beach, and Township of Tiny, and was led by Audie McCarthy and Jack Grosvenor. The lucky participants of the 50th celebration were local Stoney Creek steel manufacturer, Taylor Steel, who were also celebrating a milestone - 50 years in business. In a speech to his team, Taylor Steel's vice-president of corporate administration, Mike Coughlan, expressed appreciation to MCE for helping build their leadership strengths over the years. "We've overlooked the relationship between our departments in the past and they have been improved because of the training we've received from MCE." Participants also heard from Mohawk College president, Ron McKerlie who expressed his own appreciation for MCE's partnership.

2017 UPDATE: CHANGES IN THE LAW

Natasha Savoline, Bernardi Human Resource Law LLP

Income from new job not deducted from wrongful dismissal damages

It is a basic principle of employment law that employees who are wrongfully or constructively dismissed are expected to make a diligent effort to obtain new employment and mitigate their damages. In a wrongful dismissal action, an employer is generally entitled to a deduction for income earned by the employee from other sources during the common law notice period. However, the court of appeal in *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (CanLII) has turned this longstanding principle on its head.

In *Brake v. PJR-M2R*, the employer operated a McDonald's franchise at which the employee had been employed for 13 years. The employer also recognized her prior 7 years' service at other McDonald's franchises. After years of stellar performance reviews, the employee received a poor review in 2011, was placed on a performance improvement plan, transferred to a struggling location and told to accept a demotion or be fired.

Finding that the demotion was a unilateral, substantial change to the employee's employment for which she did not consent and which would have been humiliating, the court held that she had been constructively dismissed and awarded her 20 months' reasonable notice.

Although the employee secured a new job almost immediately, the court allowed no deduction for the mitigation income. The court ruled:

- income earned during the statutory entitlement period under the *Employment Standards Act, 2000*, is not deductible from common law damages for reasonable notice; and
- the mitigation income could not be deducted given that: a) it was minimum wage and not comparable to the management position she had held with the employer; and b) she took the job solely because she could not afford to have no income.

The court of appeal also confirmed that second sources of income that the employee earns simultaneously while working for the employer and which the employer permitted, cannot be deducted from damages for common law reasonable notice.

Lessons for employers

- income earned by a dismissed employee during the statutory notice and severance period under the ESA cannot be deducted from damages for common law reasonable notice
- income earned by a dismissed employee that is not comparable to the employee's earnings while employed with the employer will not be deductible
- income earned by a dismissed employee is not deductible from common law reasonable notice damages if the employee also earned that income from these other sources while employed with your organization

Unenforceable termination provisions can't be severed from the contract

In Ontario, employees terminated without cause are entitled to common law reasonable notice. However, employers can limit termination entitlements to the minimums required under the

Employment Standards Act, 2000 (the "ESA") through a termination provision in an employment agreement. The provision limits termination payments to any notice or pay in lieu and, if applicable, severance pay owing under the ESA, as well as expressly indicating that benefits will also continue through the statutory notice period.

In *North v. Metaswitch Networks Corporation*, 2017 ONCA 790 (CanLII), the termination provision provided that the employer could terminate the employee without cause by providing their minimum entitlements under the ESA, including continuing benefits during the statutory notice period. While the employee's pay was based in part on commissions, the termination provision went on to say that the termination payments would be based on only the employee's base pay.
The agreement also contained a "saving" provision, which stated:

> *If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect.*

The court held that the termination provision was unenforceable. It violated the ESA given that it did not include the employee's commissions in the calculation of the termination payments. The court also found that the "saving" provision could not save the termination provision. The court ruled that if a termination clause contracts out of a minimum employment standard, the entire termination clause is void. In the court's view, it "*is an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced*".

Lessons for employers:

- ensure that termination provisions in employment agreements are crafted to comply with the minimum standards required by the ESA
- indicate that termination payments will be calculated according to the minimum requirements prescribed by the ESA rather than on base pay
- "saving" provisions will not be used to make the term legally compliant
- attempts should be made to revise existing agreements that do not comply with this new interpretation of the law. Employees must sign new agreements voluntarily and in exchange for providing the employee consideration (i.e., something of value the employee would otherwise not receive and which is not received until the new agreement is signed).

bernardi 20 YEARS
HUMAN RESOURCE LAW LLP

REVISITING THE BOUNDARIES BETWEEN EMPLOYEE AND CONTRACTOR STATUS

Julia Nanos and Stephanie Jeronimo, Hicks Morley Hamilton Stewart Storie LLP

A 2017 decision of the United Kingdom Employment Appeals Tribunal ("EAT") has brought the issue of employee and contractor status back into the spotlight. In *Uber B.V. and Others v Mr. Y Aslam and Others,* technology giant Uber was pitted against a group of drivers who claimed to be the Company's employees.

Uber is an international company that markets itself as a "technology service provider". Its online application connects passengers to drivers directly. In the United Kingdom ("UK") alone, Uber has over 40,000 drivers available to service passengers. Of course, Uber has operations throughout North America, including in many major cities in Canada.

Since 2015, Uber and its UK "customers" – the Company's term for its drivers – have been governed by a partner-driver service agreement. Under the agreement, drivers in the UK are labelled as "independent companies" or "independent contractors" who provide transportation services to passengers directly.

The initial decision of the UK Employment Tribunal ("ET") found in favour of the drivers. The ET concluded that any driver with the app switched on in a territory where they were authorized to work, and who was able and willing to accept assignments, was "working" for Uber. In coming to the conclusion that drivers were "workers" of Uber, the Tribunal was guided not by the language of the partner-driver service agreement, but rather by what the Tribunal described as the "reality of the situation" – the real relationship between Uber and its drivers, as evidenced primarily by the degree of control that the Company exercised over drivers. The Tribunal found that a number of considerations pointed to there being an employment relationship, including the following:

- Drivers were required to "onboard" with the Company and, once online, their right to use the app was non-transferable;
- Uber monitored driver performance-ratings, cancellation and acceptance rates;
- Uber imposed rules on drivers. For example, drivers were prohibited from exchanging contact information with passengers;
- Drivers were "encouraged" to follow driving directions set out by the Uber app. The failure to do so could lead to adverse consequences for the driver;
- Uber set out a recommended fare. While it was open to drivers to arrange for a lesser fare with a passenger, this practice was not encouraged and Uber retained the right to have its "Service Fee" calculated on the basis of the recommended amount; and
- Any disputes between drivers and passengers were handled by Uber and Uber was the only party with the discretion to issue a refund.

The Tribunal also focused on the obligation on drivers to accept work. Drivers could log on or off the app at any time. However, when they were online they were expected to be available. Acceptance statistics were recorded and drivers were warned against accepting less than 80% of trip requests. Further, while online, a failure to confirm availability for trips twice in a row resulted in a penalty, in the form of the driver being locked out of the system for 10 minutes.

Uber appealed the ET's decision that found drivers were workers of the Company. On appeal, Uber argued that the ET erred in disregarding the express language of the partner-driver service agreement, which classified drivers as independent contractors. Uber also argued that it was not a transportation service provider, but rather an agent between drivers and customers, meaning that drivers were providing services to their passengers and not to Uber itself. Uber also argued that drivers retained control over their use of the app and the driving experience.

The EAT dismissed the Company's appeal and adopted the reasoning of the lower Tribunal, finding that the correct approach was to focus on the "true agreement" between the parties. This approach considered the real relationship between the parties and was not dictated by the language of any written agreement. The Appeals Tribunal also noted that it was important to take into account the relative bargaining power of the parties when concluding a written agreement. The fact that the Company referred to drivers as independent contractors in the service agreement did not mean that drivers could not avail themselves of statutory employment protections. For that to be the case, drivers must not be employees. That conclusion could only be drawn by examining the true relationship between drivers and the Company.

> [105] In the normal commercial environment […] the starting point will be the written contractual documentation; indeed, unless it is said to be a sham or liable to rectification, the written contract is generally also the end point – the nature of the parties' relationship and respective obligations being governed by its terms. *Here, however, the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to all the circumstances.*

The EAT also focused on Uber's "control" over drivers and, in doing so, acknowledged that the exercise of control over an individual is the primary consideration in determining whether that individual is an employee or independent contractor. In this case, the drivers' lack of control was an indication that they were not entering into contracts with passengers on their own behalf but rather on behalf of Uber. Although the EAT acknowledged that drivers were responsible for providing their own "tools" – their cars – the other factors outlined above pointed away from the drivers being independent contractors.

In conclusion, the Appeals Tribunal found that it was open to the ET to conclude that there was a contract of employment between Uber and its drivers, and that drivers were providing services to customers on behalf of Uber as part of Uber's business of providing transportation services to passengers in the London area.

Reconsidering Status in Canada in the Wake of Bill 148

What bearing does this decision from the United Kingdom have on Canadian law? Although outside our jurisdiction, the principles articulated in *Uber B.V.* are similar to those that were articulated by the Supreme Court of Canada in *671122 Ontario Ltd v Sagaz Industries Canada Inc.*, which remains the leading case on the issue of employment versus independent contractor status in Canada. In other

words, the decision of the UK EAT in *Uber B.V.* should serve as a reminder to employers of the pitfalls associated with improperly characterizing individuals as independent contractors.

Although it is important to document an independent contractor relationship into a written agreement, employers should keep in mind that the written contract will not be determinative of whether an employment or independent contractor relationship exists. The existence of an independent contractor agreement is simply one of many factors that will be examined. Similarly, the fact that the individual knowingly entered into an independent contractor relationship, and may have benefitted from that arrangement for many years, will likewise not be persuasive.

Rather, courts will examine the entirety of the relationship between the parties to determine its true nature. The central issue is whether the person engaged to perform services is performing them as a person in business on their own account, or rather are providing services on behalf of a company other than their own. The primary driving factor will be the degree of control that is (or isn't) exercised by the company over the individual and his or her daily activities. Does the individual dictate his or her own hours of work? Is the individual free to turn down work that is made available to him or her? These are only two questions that bear on the issue of control. Courts will also look at whether the individual provides his or her own equipment or supplies, whether or not the relationship is exclusive in nature, whether the individual is free to hire his or her own helpers, the degree of financial dependency (including billing arrangements), and who bears the opportunity for profit and risk of loss associated with the provision of services.

Improperly characterizing individuals as independent contractors can have serious implications, most commonly upon termination of the relationship. The fact that an individual has knowingly or willingly participated in an "independent contractor" relationship does not preclude the individual from making a successful claim for wrongful dismissal. Similarly, companies that improperly characterize individuals as independent contractors can face penalties and charges from the Canada Revenue Agency for failing to make proper deductions and remittances in respects of earnings.

These considerations have newfound importance in the wake of Bill 148. The *Fair Workplaces, Better Jobs Act, 2017* received Royal Assent on November 27, 2017, and introduced significant amendments to the *Employment Standards Act, 2000* ("*ESA*"). One such amendment is the addition of section 5.1, which prohibits employers from treating a "person who is an employee of the employer as if the person were not an employee". This amendment was enacted for the very purpose of combating precarious employment, including the mischaracterization of individuals as independent contractors. Under the amended *ESA*, employers will bear the onus of demonstrating that individuals who have been characterized as independent contractors are not employees, entitled to the minimum standards available under the *ESA*, and can face penalties under the *ESA* if unsuccessful in this regard. Unlike many other amendments contained in Bill 148, the requirement set out in section 5.1 came into force immediately upon Royal Assent.

In sum, employers in Ontario now face increased vulnerability to penalties, charges and monetary damage awards where employees are improperly misclassified as independent contractors. Employers should review their worker classifications immediately to ensure that all individuals who have been classified as independent contractors are in fact independent and not employees of the corporation. To do this, an in-depth examination of the true relationship between the corporation and the individual needs to occur. If the relationship more closely resembles that of an employment relationship, consideration needs to be given to re-classifying these individuals and documenting that change. Further, whenever engaging contractors in the future, the corporation need to do more than ensure that

a proper independent contractor agreement is in place. Although it is important to ensure that appropriate contracts are executed prior to the commencement of work, employers should consider how the relationship will work on a day-to-day level and ensure they are prepared to meet the onus of proving that the individual is truly an independent contractor.

Hicks Morley

Stephanie Jeronimo and Julia Nanos specialize in labour and employment issues facing municipalities, including with respect to Bill 148 and independent contractor and employment agreements. If you have any question about your contracts or any workplace issue, please contact Stephanie at 416-864-7350 or Julia at 416-864-7341.

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