

**Navigating the BC Employment
 Law Landscape:
 Are you ready for 2024?**

Employment & Labour Conference
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CLARK WILSON

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Navigating the BC Employment Landscape

Our firm operates from the traditional,
 ancestral, and unceded territory of the
 Skwxwú7mesh (Squamish),
 Səlilwətaʔ/Selilwitulh (Tseil-Waututh), and
 xʷməθkʷəy̍əm (Musqueam) Nations

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Outline

1. Remote Work
2. Responding to Medical Leaves
3. New laws coming in 2024

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Navigating the BC Employment Law Landscape

Remote Work

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Remote Work

- Employee rights
- Employer rights
- Issues to consider and what to put in place

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Employee Rights

- Contractual (employment agreement)
- Employment Standards Act
- Human Rights Code
- Workers Compensation Act and related occupational health and safety regulations
- Privacy



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Employee Rights

Contractual

- An employee's right to work remotely may be in their employment agreement or may be an implied term of employment if they were hired as a remote worker or have been working remotely for some time
- Changing an employee's contractual right, whether written or implied, requires agreement or notice to the employee

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Employee Rights

Employment Standards Act

- Nothing specific to remote work/work from home
- The Act still applies in full to employees working remotely
- Pay special attention to rules around overtime and meal breaks, and employer business costs

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Employee Rights

Human Rights Code

- Prevents discrimination against an employee or contractor based on a protected characteristic: Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, or conviction of a criminal or summary conviction offence unrelated to the employment or intended employment

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Employee Rights

Human Rights Code

- Family status test has been broadened by the BC Court of Appeal in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168:
 - Term of employment
 - Which results in serious interference with a substantial parental or other family duty or obligation

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Employee Rights

Human Rights Code

- Disability: includes medical condition, whether temporary or otherwise, which prevent an employee from working onsite

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Employee Rights

Workers Compensation Act and Regulations

- Ergonomic considerations
- Employees working alone
- Workplace hazards
- Reporting of work-related injury or illness

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Employee Rights

Privacy

- Electronic monitoring of employees is not generally permitted
- Any monitoring must be supported by policies and/or agreements
- Monitoring for work performance or efficiency is generally not permitted

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Employer Rights

- Contractual
- Security and confidentiality

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Employer Rights

Contractual

- Nearly all of the rights employers have relating to their employees arise from written employment agreements and policies
- These rights are always subject to relevant employment-related legislation
- In most circumstances, employers have the right to require employees to be in the workplace
- Consider including wording around location of work
- Develop policies, or possibly specific agreements, around remote work
- Changes require notice

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Employer Rights

Security and Confidentiality

- Consider the equipment the employees are using
- Review security systems and policies
- Ensure the remote workplace is conducive to ensuring security and confidentiality
- Employees have some obligation, but the onus to ensure obligations are clear and are being met is on the employer

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Issues to consider

- Jurisdiction
- Agreements or policies
- Individual employee circumstances
- Business decisions

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Issues to Consider

Jurisdiction

- Critical to know where employees are physically located when doing work
- Generally employment laws apply in the location where the employee is located, not where the company is based
- Workers compensation coverage may not cover workers working out of the province
- There may be tax considerations that need to be taken into account for employees working outside of Canada

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Issues to Consider

Agreements or policies

- These should be in place to ensure employee and employer obligations and responsibilities are clear
- Should include topics previously covered:
 - Location of work
 - Requirements of the workplace
 - Occupational health and safety considerations
 - Confidentiality and security
 - Equipment and, if applicable, expenses
- Policies can be amended, deleted, or discarded, upon providing notice

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Issues to Consider

Individual Employee Circumstances

- Human rights legislation prevents a blanket policy that applies to all employees as there will always need to be room for exceptions or the disclaimer "subject to human rights obligations"

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Issues to Consider

Business Decisions

- Will employees quit if they are forced back into the office?
- Can you conduct business properly with employees working remotely or in a hybrid situation?
- What if an employee says they will quit because someone else is allowed to work remotely and they aren't?
- What can I change to make employees more excited about coming back to the office?

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Navigating the BC Employment Law Landscape

Responding to Medical Leaves

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Employee Leaves of Absence – Sick Leave

Considerations:

- Paid sick leave
- Requesting medical information
- Privacy concerns
- Communication while on leave
- Return to work - accommodation
- Discrimination - Human Rights



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Paid Sick Leave

Paid Sick Leave

- All employees entitled to 5 paid sick days per year for personal illness or injury
 - Must have worked for employer for 90 days
 - Applies to FT or PT, temporary or casual employees
 - Employers may request reasonable proof
 - In addition to 3 days of unpaid sick leave

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Requesting Medical Information

- Employer can request “reasonably sufficient proof” that the employee is entitled to leave under ESA
- Employee must provide “as soon as practicable”

However...

- Employer does not have unfettered right to inquire into an employee's medical condition
- Employer must have employee's clear and express authorization for disclosure

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Physician's Note

- Prognosis
 - NOT diagnosis
- Prescribed treatment
- Participation in treatment plan
- Medically necessary accommodations
- Prognosis for returning to work
 - When employee will be evaluated to return to work



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Physician's Note - Issues

- Conflicting medical information warrants further testing and cooperation from an employee
- Where medical information is vague, inconsistent or inconclusive, request an IME
 - Issues where IME sets out different opinion from employee's primary care provider's opinion




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Privacy Concerns

- Employee has right to privacy regarding reason for leave of absence, information regarding RTW, accommodations
- Employer can inform other employees of employee being on leave if necessary, do not disclose reason for leave
- Ensure employee's medical information is kept private and confidential, on a need to know basis



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Contacting an Employee on Sick Leave

- No requirement to maintain contact with employee (except workplace injury or illness)
- No requirement to refrain from contacting employee
- Good idea to stay in touch regarding the employee's health, expected return to work date

*Do not contact employee regarding work related matters

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Changes to Employment While on Leave

Don't.

- Must not terminate employee due to the leave
 - Don't terminate employee while on leave
- Don't change condition of employment, without employee's consent
 - Risk – Human Rights Complaint, constructive dismissal

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Return to Work

As mentioned, good idea to stay in touch with employees regarding their return to work, can request that information from their physician/primary care provider

- Once they are ready to return to work, employee has obligation to communicate regarding any accommodation requirement
- Employer's obligation is to *reasonably* accommodate employee
 - *Wilcox v. University of British Columbia and others*, 2014 BCHRT 228

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Return to Work – Undue Hardship

- Point of undue hardship depends on the circumstances of each situation
- Unfortunately, no bright line test!
- Generally speaking, the point at which it is too unsafe, difficult, or expensive to remove barriers so that employees can participate in work

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Return to Work – Undue Hardship

However...

- Just because it impacts your budget, doesn't = undue hardship
- Just because it impacts other employees, doesn't = undue hardship
- If you think you might be reaching the point of undue hardship, reach out for legal advice

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Failure to Return to Work

- Make efforts to contact employee
 - In same manner you would contact while they were at work
 - Call? Text? Email (work or personal?)
- If no response and no additional medical information:
 - Notify employee of expected return to work date (give adequate notice)
 - Set out deemed resignation if failure to return
 - Send registered mail – ensure employee receives notice

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Issues to Consider

- Sick leave policy
- Privacy policy
- If questioning undue hardship, seek legal advice
- Ensure management aware of considerations while employee is on leave
- Provide adequate notice of RTW if no contact
- Reach out with any questions



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Navigating the BC Employment Law Landscape

New Laws Coming In 2024

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1. Workers Compensation Act

Currently, there is no statutory obligation to return an employee to work after a workplace injury or illness (subject to human rights legislation, i.e., disability)

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Bill 41 – Workers Compensation Amendment Act

- s. 154.2 – Duty to Cooperate
- s. 154.3 – Duty to Maintain Employment

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Duty to Cooperate

An employer must:

1. Contact the worker as soon as possible after the injury and maintain communication with the worker
QUERY: What if the employee is on a mental-health related leave due to alleged workplace bullying and harassment?
2. Identify suitable work that restores full wages
NOTE: "Suitable", not the same as comparable
3. Provide the Board with information it requires in relation to worker's return

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Duty to Cooperate

A worker must:

1. Contact the employer as soon as practicable after the injury and maintain communication with the employer
2. On request of the employer, assist in identifying suitable work that restores full wages
3. Provide the Board with information it requires in relation to their return

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Duty to Cooperate

Exception to communication:

If, having regard to all of the circumstances, contact and communication between the employer and worker are "likely to imperil or delay the worker's recovery."

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Duty to Cooperate

If either party fails to comply with their obligations, the Board must make a "determination" within 60 days (or longer as the Board determines)

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Duty to Cooperate

- If worker fails to comply, the Board may reduce
- If employer fails to comply, the Board may impose an administrative penalty not greater than \$116,700 for 2024 (i.e. maximum wage rate determined under the Act)

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Duty to Maintain Employment

If a worker has continuous employment with the employer for at least 12 months, and the employer regularly employs more than 20 workers:

1. Employer must offer the first suitable work that becomes available if a worker is fit to return but not fit to carry out essential duties of pre-injury duty
2. If a worker is fit to carry out essential duties, employer must offer pre-injury work or comparable work and wages

... to the point of undue hardship

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Duty to Maintain Employment

Unlike human rights legislation:

- Employer's obligation to return the worker ends on the second anniversary of the date of injury if worker has not yet returned
- Employer's obligation to return the worker to the same or comparable work ends on the second anniversary of the date of injury if the worker is carrying out suitable work

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Duty to Maintain Employment

A worker cannot be terminated within 6 months of return to work unless employer can prove the termination was unrelated to the injury

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Duty to Maintain Employment

Steps to Take

1. Communicate with workers on WCB leaves – no longer let WorkSafeBC handle the matter
2. Be prepared to initiate accommodation processes

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2. Pay Transparency Act

Pay Transparency Report

Employers must report:

1. By November 1, 2024, if it has 1,000 or more employees
2. By November 1, 2025, if it has 300 or more employees
3. By November 1, 2026, if it has 50 or more employees
4. After 2026, less than 49 and a number to be determined

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Pay Transparency Report

What must a Pay Transparency Report contain:

- The pay gap, being the difference in total compensation between men, women, and non-binary people, and possibly the percentage of each gender in the workplace
- Actual wages not likely to be included
- Report must be posted on employer's website

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Pay Transparency Report

Currently no enforcement mechanisms or penalties for non-compliance, but:

1. Director of Pay Transparency
2. Section 12 *Human Rights Code* re: wage discrimination

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Pay Transparency Report

Steps to Take Now:

1. Review BC's Gender and Sex Data Standard (January 23, 2023)
2. Make "reasonable efforts to collect" the data
3. Policies and Guide and document compensation discussions with employees

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3. Amendments to the *Competition Act*

- Effective June 23, 2023, non-solicitation and no-hire agreements between employers are illegal
- Still allowed non-solicitation agreements with your employees
- Penalty is up to 14 years in prison and/or fines at the Court's discretion employer's website

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4. Bill S-211 "*Modern Slavery Act*"

- Effective January 1, 2024 with first reports required to be filed by May 31, 2024
- To curb forced labour in Canadian companies' supply chains

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Modern Slavery Act

Who must report?

1. Does the entity sell or distribute goods in Canada or elsewhere or import goods produced outside of Canada?
2. If so, is the entity listed on a Canadian stock exchange, or, have assets, a place of business or otherwise do business in Canada?
3. If so, does it meet at least two of the following for one of the last two fiscal years:
 - a. \$20 M in assets
 - b. \$40 M in revenue
 - c. 250 employees

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Modern Slavery Act

What must be reported?

1. The entity's structure and supply chains
2. Policies and due diligence processes in relation to forced and child labour
3. Parts of the business and supply chains that carry a risk and steps to assess and manage that risk
4. Measures taken to remediate forced and child labour and loss of income to families.
5. Training provided to employees on forced and child labour
6. Its effectiveness in ensuring forced and child labour are not used in business and supply chains

*The report must be placed on the entity's website

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Modern Slavery Act

What are the penalties?

- Failure to report - \$250,000
- Reputational Risk

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Modern Slavery Act

Steps to Take Now:

1. Create policies on selecting suppliers
2. Research employment practices of potential or current suppliers
3. Consider contractual obligations with suppliers regarding labour used

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QUESTIONS?

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