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ESSENTIAL SERVICES SUMMARY

On June 27, 2019, the Saskatchewan Labour Relations Board issued a decision on LRB File No. 015. This was the first full decision of an Essential Services Tribunal (the “Tribunal”) in Saskatchewan, and it involved an essential services dispute between the University of Saskatchewan and CUPE 1975.

Following the *Saskatchewan Federation of Labour* (“SFL”) ruling by the Supreme Court of Canada in 2015 in which Saskatchewan’s former essential services legislation was determined to be unconstitutional, the Saskatchewan legislature amended *The Saskatchewan Employment Act* (the “SEA”) to provide for a new essential services regime with a view to complying with the Charter and international norms. Among the key changes were the removal of a statutory definition of “essential services”, as well as the removal of reference to any specific entities or employers as essential services providers.

By removing the definition of “essential service”, the Saskatchewan legislature left it to the employer and the union to attempt to agree on whether the employer provided “essential services” on a workplace-by-workplace basis and to agree on which positions were essential before a strike or lockout can occur. If an essential services agreement cannot be reached between the employer and the union, then the Essential Services Tribunal hears evidence on the positions and renders a decision. Without a statutory definition of “essential services”, the Tribunal is left to examine case law (including International Labour Organization, or “ILO” case law) for a sense of what qualifies as “essential services” in the context of each workplace.

Given that this was the first essential services tribunal hearing in Saskatchewan history, there was a great deal of uncertainty surrounding the process and likely outcomes. One of the uncertainties was whether the University even qualified as an essential service provider. CUPE took the position that under international essential services principles, the educational sector is deemed to not deliver essential services to the public. The Tribunal considered and rejected CUPE’s argument.

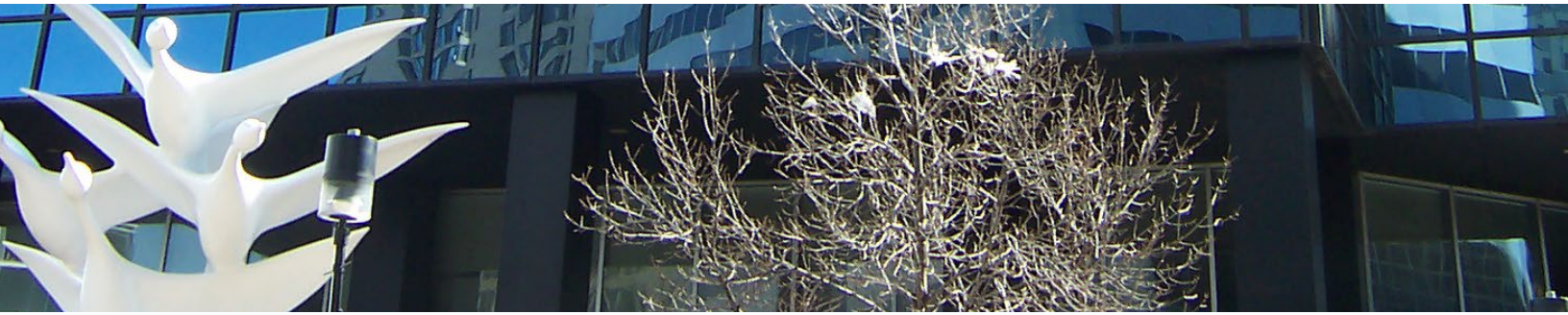
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ESSENTIAL SERVICES SUMMARY (CONT.)

Three key takeaways from the decision are the following:

1. The Tribunal found that the University provides essential services

The Tribunal accepted the University’s argument that the University provides essential services to the public, notwithstanding the ILO’s position that the education sector is not an essential service provider. The Tribunal found that many services provided by CUPE 1975 were “essential” insofar as their interruption would endanger the life, personal safety or health of the whole or part of the population, and therefore those positions must continue to report to work in the event of a strike or lockout. Over 40 positions across many departments and types of job functions were designated as essential services, such as:

- a. Staff providing clinical services, and supporting medical professionals, in dentistry, specialized medicine, and family medicine clinics both on- and off-campus;
- b. Staff providing clinical services, and supporting medical professionals, providing crisis services to university students and their families at the Student Wellness Centre on campus;
- c. Tradespersons involved in University’s Facilities group, including boiler operators, controls technicians, millwright, steamfitter, draftsperson, and locksmith positions;
- d. Maintenance and janitorial staff on campus including targeted areas such as student living facilities, bathrooms, childcare facilities, and clinical facilities;
- e. Data processing staff to ensure payroll, disability, and other benefits payments would continue;
- f. Environmental protection technicians engaged to assist with removing chemical, biological, and radioactive waste on campus, and responding to emergency spill calls;
- g. Staff to order and handle dangerous goods in the Veterinary College and the Department of Chemistry; and
- h. A dispatcher and platoon members providing campus security 24 hours a day, 7 days per week, 365 days per year with Protective Services.

2. Employer may determine what constitutes an “emergency” for the sake of call-in protocol

The *SEA* requires the Tribunal to establish the “procedures that must be followed to respond to an emergency during a work stoppage.” The University provided the Tribunal with a proposed procedure that, in essence, required University and CUPE representatives to meet in the event of the an emergency, and if the existing complement of out of scope, essential, and on-call staff is insufficient to deal with the emergency, additional non-essential services would be redeployed to help assist with the emergency if the University considered the event to be an emergency.

CUPE argued that non-essential services staff should only be deployed in the event that CUPE agreed with the University on whether the event constituted an emergency. The Tribunal determined that CUPE’s proposal was unworkable and adopted the University’s proposal, consistent with the principle of “obey now, grieve later” often found in labour relations case law.

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ESSENTIAL SERVICES SUMMARY (CONT.)

3. Many animal care services are not considered an “essential service”

The Tribunal did not agree with the University’s position that the care of animals fell within the scope of protecting “the life, personal safety or health of the whole or part of the population”. The Tribunal’s decision makes it clear that they considered only the life, personal safety, or health of the *human population* as relevant when examining the services provided through CUPE members.

The Tribunal ruled that animals are “property” and animal care will only be regarded as an essential service if human health were put at risk by the absence of such care. The Tribunal allowed a small number of animal care positions that seemed to be tied to risks of human health, but overall the Tribunal did not consider, or ignored, evidence provided to them about the effects of sick, injured, or dead animals associated with the University on life, personal safety or health of the human population. This aspect of the decision is inconsistent with case law from other jurisdictions where animal care has been included in essential service arrangements. *M*

CANADA LABOUR CODE CHANGES

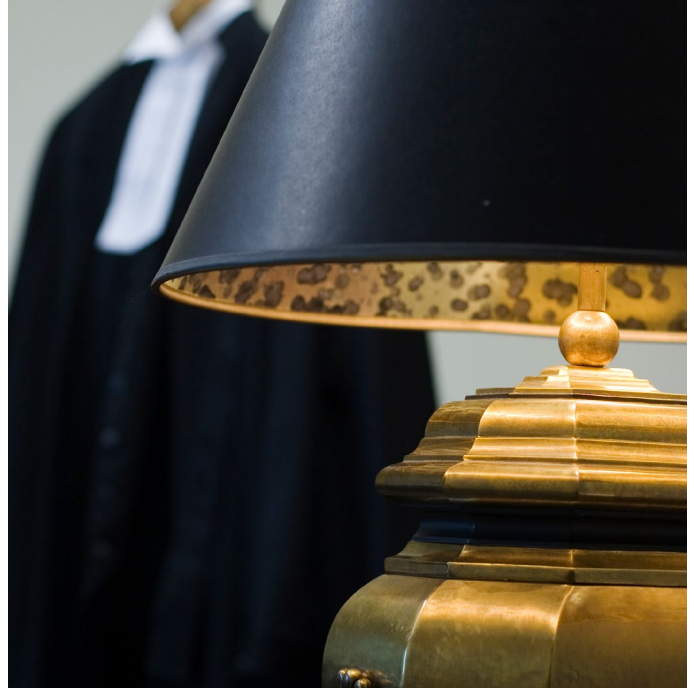
Significant changes to the labour standards provisions to the *Canada Labour Code* (“Code”) came into effect on September 1, 2019. This will impact those employers operating in federally-regulated industries such as core First Nations entities, international or interprovincial transport services, telecommunications, banks, and nuclear facilities.

Five key changes are as follows (though there are some exceptions to all of these):

1. **Notice of Scheduling:** employers must provide employees with their work schedule in writing and with at least 96 hours (4 full days) prior to the start of their first shift under that schedule. If 96 hours notice is not provided, the employee may refuse the work beginning within 96 hours from the time the schedule is provided. Employers are prohibited from punishing an employee for refusing to report to work under these circumstances.
2. **Meal Breaks and Rest Periods:** employees are entitled to receive an unpaid break of at least 30 minutes for every period of 5 consecutive worked hours, as well as a rest period of at least 8 consecutive hours between work periods or shifts.

3. **Notice of Shift Changes:** employers must provide 24 hours’ notice in writing if changing or adding a shift to an employee’s schedule.
4. **Refusal of Overtime Permitted:** employees are entitled to refuse overtime in order to carry out specified family responsibilities.
5. **Flexible Work Arrangements:** Employees with at least 6 months of service may formally request a change in working conditions, such as a change to their work schedule, work location, or other conditions found in the Regulations. Employers may only refuse such accommodation requests in certain circumstances where there are legitimate operational reasons for denying the request and must provide written reasons for the eventual decision.

There have also been significant changes to the *Code* provisions regarding leaves of absence, vacation, and medical and nursing breaks which are too numerous to list here. We would be pleased to advise our federally regulated clients on these new changes and how they are being implemented. *M*



CASE STUDY: *RYHORSKI V COMMERCIAL INDUSTRIAL MANUFACTURING LTD.*, 2019 SKQB 85.

Compliance with requirements regarding health-related leaves of absences and accommodations is essential for Saskatchewan employers. However, the decision in *Ryhorski v. Commercial Industrial Manufacturing Ltd.* suggests that employers may be entitled to treat employment relationships as at an end if employees frustrate or abandon their employment.

The plaintiff in this case was employed as a welder by the defendant corporation. Beginning February 9, 2014, the plaintiff was absent from work due to medical conditions. The plaintiff received benefits for several months until the insurance provider determined that he no longer met the definition of “total disability” on April 26, 2014.

Over the next several months the employee did not return to work and there was little communication between the parties. The employer issued two Records of Employment (ROE) citing “quit/health” as the reason for issuance. In one ROE, the employer stated that the employee’s insurance provider did not find a valid reason for why he had not returned to work. Throughout the process, the defendant made it clear that the door was open for the plaintiff to return to work if he settled his medical questions with the insurer. The defendant tried to contact the employee twice to arrange for him to retrieve his personal items but received no response. In March 2016, the plaintiff moved to another town and began working at a welding shop. At no point was the plaintiff cleared by his physicians to return to work.

The plaintiff claimed that he was wrongfully dismissed. The defendant claimed that the plaintiff abandoned his employment and frustrated his employment contract. The court considered both issues.

Abandonment:

The court stated that the legal test for abandonment is whether the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract.


The court held that the test was satisfied, and the plaintiff had abandoned his employment with the defendant. Various factors influenced the court’s decision. First, the time period in which the plaintiff was absent from work was significant as the health insurer saw no reason why he could not have returned to work after April 26, 2014. Second, the court found that it had been clear to the plaintiff that the defendant was willing to accept him back to work if he settled his medical questions with the insurer. Third, the plaintiff had not responded to inquiries by the defendant and had not informed the defendant of an ongoing legal dispute with the health insurer regarding coverage. Fourth, the plaintiff had relocated and accepted employment elsewhere.

Frustration:

The court stated that the legal test is whether, at the time of the plaintiff’s termination of employment, there was no reasonable likelihood that he would be able to return to work within a reasonable period of time.

The court found that even though the health insurer believed the plaintiff could return to work, he had not been cleared by a physician to do so. The court held that, as of January 2015, there was no reasonable likelihood that the plaintiff would be able to return to work within a reasonable time. The contract of employment was frustrated.

Conclusion:

It is important for employers across Saskatchewan to be aware of the standards expected of both their organization and their employees when addressing health-related absences. Employers must ensure that they comply with relevant standards while recognizing that they may be entitled to treat employment relationships as at an end due to frustration or abandonment. 



SWIDROVICH V SASKATCHEWAN PLACE ASSOCIATION INC. (COB CREDIT UNION CENTRE), 2019 SKQB 50.


The Saskatchewan Court of Queen's Bench recently broke through the previous ceiling of notice required for dismissals without just cause. In *Swidrovich v. Saskatchewan Place Association Inc.*, Justice R. W. Elson exceeded previous high-water marks in Saskatchewan and awarded the plaintiffs 20 and 24 months of reasonable notice.

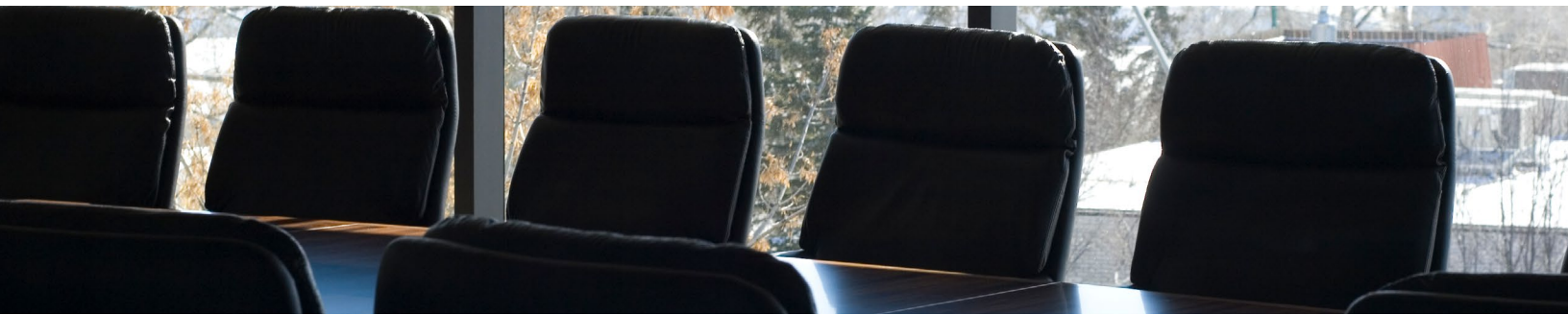
The plaintiffs in *Swidrovich v. Saskatchewan Place Association Inc.* were both directors at the defendant organization. Swidrovich was 56 years old and had worked for the defendant for 18 years. Antonishyn was 62 years old and had worked for the defendant for 22 years. The plaintiffs' employment was terminated with alleged just cause in 2012 after accusations of misconduct. The defendant asserted that the plaintiffs took a company trip to Phoenix, Arizona in 2011 that served no business purpose and that the plaintiffs thereby breached their duty of honesty.

In response, the plaintiffs argued that the trip served several business purposes including building client relationships and taking unguided tours of arena facilities. The plaintiffs also alleged that the trip was authorized by the then executive director and that similar trips taken in 2009 and 2010 were covered under the executive director's discretionary limit not subject to board approval.

The Court noted that to establish just cause on the basis of dishonesty, the defendant had to present clear, cogent and convincing evidence that it had not expressly or implicitly authorized the 2011 trip, and that the plaintiffs knew, or ought to have known, this to be so. The court found that the defendant failed to meet the burden of proving dishonesty as the outgoing executive director had authorized the trip and the plaintiffs were not aware, nor should they have been aware, that the outgoing executive director had acted improperly.

After deciding that there was no just cause for the dismissals, the court considered how much notice should have been given. In doing so, the court applied four factors relevant to determining reasonable notice: the character of the employment; the length of service of the employee; the age of the employee; and the availability of similar employment. The court found that both plaintiffs were older, had been with the organization for many years, and had held executive positions. Swidrovich was awarded damages equivalent to notice of 20 months. Antonishyn was awarded damages equivalent to notice of 24 months as the court found that he would have remained in his position until age 65 if he had not been dismissed.

The decision of Justice Elson should be noted by employers in Saskatchewan as it creates a new ceiling on reasonable notice awards in Saskatchewan. 



BEHAVIOUR DURING UNION DRIVE - FILE NO. 250-17, DECEMBER 31, 2018

The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 (the “Union”) brought an application claiming an Unfair Labour Practice committed by Reliance Gregg’s Home Services, a Division of Reliance Comfort Limited Partnership (Gregg’s).

In this decision, the Union made numerous allegations under the *Saskatchewan Employment Act* (the “SEA”), all of which were dismissed as there was insufficient evidence to support the allegations. This decision sets out what the Labour Relations Board determined to be acceptable behaviour during a union drive in this specific case.

Allegations under section 6-62(1)(a)

- 6-62 (1)** *It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
- (a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
 - (2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

The Union claimed Gregg’s committed five separate violations of 6-62(1)(a) of the *SEA*.

1. All-Employee Meeting

This meeting began as a mandatory staff meeting but transitioned into an optional discussion about Union representation. Gregg’s CEO expressly stated that he did not want employees to join the union and he advised them to “vote no for a union”. The CEO also shared his opinion that individual employee flexibility suffered when employees bargained collectively. The Labour Relations Board (the “Board”) held that an employee of reasonable intelligence and fortitude would not be intimidated by the CEO’s comments. The Board held that the SEA was designed to allow employers to express their opinions and provide facts to employees about unions. The Board rejected the Unions’ argument that employees were forced to stay as the employees made a conscious decision to be present at the optional portion of the meeting.

2. The Wage Schedule

Gregg’s provided employees at the meeting with the wage schedule for the collective agreement between the Construction Labour Relations Association of Saskatchewan and the plumbers/pipefitters. The Union claimed that the schedule was misleading. However, the schedule represented a statement of fact by Gregg’s and did not violate the *SEA*. The Board held that Gregg’s had simply distributed the wage schedule, which was a statement of fact, and left any analysis of the schedule to the employees.

3. November 24th Letter to Employees

This letter was sent to the employee’s home addresses. Although the letter expressed Gregg’s negative opinion about unions, the letter also stated that employees had the right to have a union represent them. The Board held that the letter was merely expressing Gregg’s opinion and did not violate the *SEA*.

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BEHAVIOUR DURING UNION DRIVE - FILE NO. 250-17, DECEMBER 31, 2018 (CONT.)

4. The Informational Posters

Each of the posters in the workplace was headed “FACTS!!!” and encouraged employees not to vote for the Union. The topics discussed on the posters were potential strikes during a collective bargaining agreement, job security, competitive wage and benefits package, and direct communication with employees. The Board held that the posters represented statements of fact and opinions and did not violate the *SEA*.

5. December 1st Letter to Employees

This letter was also sent to the employee’s home addresses. The Union claimed the letter violated the *SEA* because it suggested (a) that wages would decrease if the Union obtained representational rights, (b) that Gregg’s assertion that it paid competitive wages was unproven, (c) that the reference to strikes failed to mention availability of strike pay, and (d) that the letter contained a statement that it would be “very difficult to go back” if the employees chose to be represented by the Union.

The Board determined that the letter was designed to spark debate and questions to the Union and was not meant as a threat or a means of coercion or intimidation. The Board held that the comments in the letter represented statements of fact and did not violate the *SEA*.

Allegations under section 6-62(1)(g)

- 6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
- (g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
 - (4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*
 - (a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
 - (b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*
 - (5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.*


The Union claimed that Gregg’s offered an illusory and exclusive benefit to coerce an employee to reject the Union. This claim referred to an incident when Gregg’s offered an employee a “top up” as a result of completing apprenticeship programs. The Board was satisfied that this top-up benefit was long-standing and available to all employees, even though the employee was unaware of the benefit prior to the offer.

Allegations under section 6-62(1)(j)

- 6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
- (i) to maintain a system of industrial espionage or to employ or direct any person to spy on a union member or on the proceedings of a labour organization or its offices or on the exercise of any employee of any right provided by this part.*

The Union claimed that Gregg’s engaged in industrial espionage because employees spied on the Union organizing campaign. The Union’s only evidence was that employees forwarded emails from the Union organizing campaign to Gregg’s Construction Manager. The Board accepted Gregg’s assertion that the information was public and did not violate the *SEA*.

The Onus on the Union

The Labour Relations Board emphasized that the onus of proof rests upon the Union. The Union had failed to prove that Gregg’s interfered with, restrained, intimidated, threatened, or coerced an employee of reasonable intelligence or fortitude in the exercise of their rights under the *SEA*. 



GIG ECONOMY: PROS AND CONS

The gig economy is a system that relies on temporary contracts where individuals are paid exclusively for the “gig” at hand, contrary to the traditional hourly wage or salary-based system.

In the gig economy, individuals are typically defined as independent contractors, and therefore do not receive the same treatment and benefits as employees. As the workforce becomes increasingly mobile, the gig economy may experience endless opportunities for growth. Temporary jobs that make up the gig economy include providing short term rental services via Airbnb, freelance consulting, marketing services for social media such as Instagram, photography services, food delivery service for Skip the Dishes and ride-share services with Uber.

Jobs in the gig economy are attractive to individuals for many reasons. Personal autonomy and work life balance are increased as many of the jobs are administered through the web and do not require scheduled work hours. This means individuals can join the gig economy in numerous capacities and supplement their income from an existing job, earn income between jobs, or become a full-time gig worker. It is not uncommon for today’s workers to change careers numerous times, unlike previous generations of workers, who tended to stay in the same jobs for much of their careers. The lack of long-term commitment that working in the gig economy allows is attractive to many in today’s workforce.

Another benefit of the gig economy is the potential impact on macroeconomics. The gig economy can potentially strengthen the Canadian economy; fewer people are unemployed since temporary jobs have few barriers. Organizations contracting with individuals in the gig economy benefit as well because they have access to a pool of flexible staff members. Contracting in the gig economy is also less expensive as individuals typically do not receive benefits and are not paid a consistently high salary.

Temporary jobs in the gig economy are not, without their challenges, however. Instead of the businesses taking the vast majority of the labour risk, which has been customary, individual contractors now accept significantly more risk in the business relationship with little to no protection in the event of job loss or disability. Since gig workers are not defined as employees, they typically do not receive benefits such as disability leave, health insurance, minimum wage, overtime pay, pension plans,

severance pay, sick days and unemployment insurance. Gig workers are also responsible for managing their own taxes. Businesses also have an incentive to choose gig workers over full-time employees as they can save a significant amount of money.

It can be argued that the loss of these benefits may hinder the Canadian economy and offset the decrease in unemployment by undermining traditional full-time employment and creating a two-tier labour market. One can readily envision a middle to upper tier of the economy consisting of full-time employees with benefits, and a lower tier made up of low-skilled gig workers with no benefits. Some argue this could potentially wipe-out the middle class and devastate the Canadian economy.

Legislation that could provide greater protection to gig workers is not up-to-date and often differs from province to province, potentially leaving individuals unprotected and businesses in a state of uncertainty. For example, workers are most often defined by the courts as either employees or independent contractors (with the growing recognition of a hybrid “dependent contractor”). Each characterization imposes somewhat different obligations upon employers in dealing with these workers.

As gig workers continue to demand rights and protections, and as the relevant legislation changes, employers must be proactive to mitigate their risk of lawsuits and other liabilities. Businesses must take steps to educate themselves and understand the classification and rights of gig workers within their jurisdictions. For example, legislation and/or case law in certain provinces may view some gig workers as employees, while recognizing others as independent or dependent contractors, each with differing rights and obligations. Because the classification of a worker as an employee or contractor is often based on control, it is recommended that businesses impose as few rules and restrictions as possible upon their gig workers to militate against a finding of an employee relationship, which carries the most onerous obligations and responsibilities. *m*



Employment & Labour Law

Our Firm actively advises clients on labour-related matters and routinely represents clients in appearances before the courts, the Labour Relations Board and various arbitration and human rights tribunals. We represent both Federally and Provincially regulated clientele.

Our experience covers all aspects of labour and employment law, including unjust dismissal disputes, collective bargaining disputes and human rights complaints.

Our lawyers are experienced in advising workplaces regarding the rights and duties of all parties as set out by the occupational health and safety regulations as well as advising on the federal or provincial labour codes that are applicable depending on the sector involved.

We have experience across many industries from construction and non-profit to educational institutions and national retail outlets.

EXPERIENCE IN:

- Collective Bargaining Issues
- Labour Disputes
- Grievance Arbitration
- Termination Disputes
- Human Rights Issues
- Occupational Health and Safety
- Pension Law

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