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Nathaly Pinchuk  
RPR, CMP  
Executive Director

# Staying Connected in Strange Times

*The key to staying sane*

Someday the pandemic will really end and we will get our lives back- perhaps not 'normal', but a new 'normal'. What did we learn about isolation and being alone within your family bubble for extended periods of time? We learned more than how to make sourdough bread or perfecting our Wordle skills.

I learned that while physical isolation and separation may have been absolutely essential at various points, social isolation was horrible. I really missed my friends, my family, my yoga group and my book club. At the onset, I was almost lost being alone, except for my immediate family, for any more than a week or so. What did I do about it? First, I tried using the telephone. Since most of my work involves being glued to a headset all day, that didn't do the trick. Also, I could only manage one conversation at a time.

Then came Zoom. I know all about Zoom fatigue and the disconnect that many feel when watching others through what appears to be miniature TV screens. I also know that some use Zoom all day the same way I use my phone. For me, somehow Zoom worked. My friends set up regular meetings via Zoom; my yoga instructor taught daily classes. Some who were more technologically challenged had to be convinced and trained, but once they were, they embraced it.

Zoom wasn't perfect and not the same as connecting in person. However, it broke the loneliness, boredom and loss of connection I was feeling. I found a way to stay sane by staying connected while the whole world was going crazy. I also did other activities and routines that kept me healthy physically and

emotionally through these stressful times.

This included trying to eat healthier. In some ways, that was easier and harder at the same time. Easier, because I was home and had time to cook and harder because it was so easy to overeat and order takeout. What's that got to do with staying sane? There is a direct correlation to how we feel physically, mentally or emotionally and having a good diet helps us stay on the healthy side of that equation. The BC Women's Health Centre says that eating healthfully improves our physical and mental health and our quality of life. Good food gives us energy, improves our mood and makes it easier to maintain a healthy weight.

I also did yoga three times a week with my favourite teacher and my old yoga gang. Believe it or not, virtual yoga is still going strong today. Yoga, like meditation and breathing exercises, is as vital for your mind as it is for your body. The great part about classes on Zoom with participants you know is that this also filled an important social component. For ten minutes before and five minutes after class, we had a chance to chat and catch up. This was not solely exercise, but also social interaction to ease the emotional stress and

break the isolation. I also found some excellent fitness apps and countless videos on YouTube.

All of that and regular Zoom calls with groups of friends and family carried me through, safe and sound. In fact, I liked some of these things so much I plan to continue them in the future. I may not do as many Zoom calls. It's hard to hug people on that platform and I seriously missed the hugs.

It's now fall and while a lot of the world has opened up, it may not be indefinitely. Those who attended gyms and yoga studios are still not all rushing back due to health and safety concerns. Thankfully, the summer months allowed us the opportunity to get together outdoors, even with those who had health issues.

I understand that the pandemic is far from totally over. We have all developed new skills and habits that would not have happened without the lockdowns.

It's important to stay connected in person or virtually. I am a firm believer that no person is an island. We must strive to cultivate new ways to stay connected and in touch so that we all stay sane!

*Nathaly Pinchuk is Executive Director of IPM [Institute of Professional Management].*



*"You'll be happy to know, Johnson, that since I moved your desk out here in the alley, office morale has gone up 300%"*

Perspective



Brian W. Pascal  
RPR, CMP, RPT  
President

President's Message

# The Need to Take a Break

Your employer deserves it

We have lived in a rise and grind culture for too long. As workplace dynamics change, it is up to you to take advantage of the possibilities that offer an improved work-life balance. I'm not saying that I don't respect career-driven workhorses who achieved their goals through dedication and perseverance, but it's critical to know where to draw the line. Everyone needs time away to unwind—even (and especially) managers. I understand that with a hefty responsibility load staring you down on any given day, the prospect of planning a vacation may seem like more trouble than it's worth. That's not true. In fact, the benefits of some strategically taken time off generally outweigh the drawbacks.

Burnout, overload, sheer exhaustion or whatever you want to call it—it's real. You may think you are stronger than the rest of us who ultimately succumb to the strain our work puts on us, but you're not. Not only is burnout a common issue among business leaders, but it has the most problematic consequences the further up the organization it strikes. More importantly, it's completely avoidable.

Working at lightning speed every day might seem like a noble cause, but it will inevitably have a negative impact on your ability to work effectively, productively and creatively, not to mention on your physical and mental wellbeing and your personal life. If you genuinely want to do right by the employees and clients who rely on you, it is time to take your own well-being seriously. Regularly making time for vacation will ensure you can

continue giving your all when you are at work—and that you're setting a good example for those around you.

Have you ever felt that your team has hit a slump and the ideas just aren't flowing like they used to? Well, there's a good chance that everyone is so caught up in the hustle and bustle that they haven't had an opportunity to reflect on the state of things and generate any innovative approaches. By taking a step back, you give yourself the chance to gain some perspective and devise a way to implement new and better ways to reach critical business goals going forward.

I get that this may not be the ideal time for everyone to board an airplane and travel internationally. As I write this column, I feel for our valued GTA members and subscribers. Toronto's Pearson International Airport has been ranked the world's worst airport for flight delays. Obviously, we all know that a vacation does not necessarily mean a trip out of town or country. Spending time at home with family or friends and doing a "staycation" has just as much benefit as travelling away from home. That's another lesson that the pandemic taught us.

Simply put, time off helps inspire and motivate managers to do better work for both their clients and employees.

If you haven't booked your vacation time off yet, now's the time to look at your calendar and start planning!

*Brian Pascal is President of IPM [Institute of Professional Management].*

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**Ruben Goulart**  
LL. B  
Founder,  
Goulart Workplace  
Lawyers



**Rachel Goldenberg**  
J.D.  
Senior Associate,  
Goulart Workplace  
Lawyers

## **Working for Workers Act: Round Two**

In December 2021, the Ontario government passed Bill 27: *Working for Workers Act, 2021*, which made a number of changes to employment-related legislation. This included a ban on non-compete agreements and the introduction of right to disconnect policies for certain workplaces.

Two short months later, the Ontario government proposed Bill 88: *Working for Workers Act, 2022*, which if passed, will make another set of sweeping changes to employment legislation.

This article highlights the proposed changes that will impact employers.

Bill 88 proposes a number of amendments to the Ontario *Employment Standards Act, 2000* (“ESA”), including:

- An electronic monitoring policy will be required for employers with more than 25 employees. The policy must include:

- whether the employer electronically monitors its employees;
- if so, a description of how, in what circumstances and for what purpose the monitoring will occur; and,
- the date the policy and any changes were prepared.

- Certain business and information technology consultants will be exempt from the ESA.

- Reservist leave will apply to military skills training.

The proposed changes to the Ontario **Occupational Health and Safety Act** (“OHSA”) include:

- The maximum fine for Directors and Officers will be increased from \$100,000 to \$1,500,000.

- The maximum fine for other individuals (including supervisors) will be increased to \$500,000.

- A list of aggravating factors must be considered when determining the appropriate penalty.

- Where there is a risk of an employee having an opioid overdose at the workplace, the employer must provide naloxone kits.

- Most significant for employers, the limitation period for a prosecution will be increased from one to two years.

If passed, Bill 88 will also create the **Digital Platform Workers’ Rights Act, 2022** (the “Act”), which sets out various entitlements for workers that are offered work assignments through a digital platform. This would include workers of ride sharing, delivery and courier companies that use digital platforms to assign work, often referred to as “gig workers”.

Although such workers will not be entitled to the protections offered to employees under the ESA, the

Act offers a number of protections that mirror some of the ESA entitlements, including:

- **The Right to Information:** Workers will be entitled to specific written information with respect to their work. This includes information with respect to how pay is calculated, the collection of tips and gratuities, the recurring pay period, the factors used to assign work, and any performance rating system.

- **The Right to a Recurring Pay Period:** The operators of a digital platform will be required to establish a recurring pay period and pay its workers all amount earned, including gratuities, during that period.

- **The Right to Minimum Wage:** Workers will be entitled to be paid the minimum wage rate established under the ESA for all work assignments. Tips and gratuities will not be included in this assessment.

- **The Right to Amounts Earned:** Operators of a digital platform will not be permitted to withhold or make deductions from a worker’s pay, or require a worker to return earnings (including tips), unless such deduction is authorized under application legislation.

- **The Right to Notice of Removal:** Workers will be entitled to two weeks written notice before being removed from a digital platform for 24 hours or longer. Workers will also be entitled to a written explanation outlining the reason they are being removed. Workers that are guilty of willful misconduct will not be entitled to notice of removal.

- **The Right to Resolve Work Related Disputes:** Workers will be entitled to have their work-related disputes resolved in Ontario, rather than a foreign jurisdiction.

- **The Right to be Free from Reprisal:** A worker will be free from reprisal for inquiring into their rights under the Act, filing a complaint or exercising their rights under the Act.

In addition, the Act will require operators of a digital platform to keep records with respect to each worker for three years after the termination of the worker’s access to the digital platform.

While the Act will only apply to select companies that are engaged in the operation of a digital platform, if the Act is passed, it will have an incredible impact on the gig economy. Operators will have to make a number of changes to the operation of the digital platforms, which will undoubtedly trickle down to the users of those platforms.

*Ruben Goulart is the founder of the firm Goulart Workplace Lawyers and can be reached via email at [rgoulart@goulartlawyers.ca](mailto:rgoulart@goulartlawyers.ca).*

*Rachel Goldenberg is Senior Associate with Goulart Workplace Lawyers and can be reached via email at [rgoldenberg@gourtlawyers.ca](mailto:rgoldenberg@gourtlawyers.ca).*

# The Transition from Remote to the In Person Workplace — *The “one size fits all” approach may not work*



**Colin Fetter**  
LL. B.  
Partner,  
Brownlee LLP



**Kyle Allen**  
J.D.  
Associate,  
Brownlee LLP

Many employers across Canada are in the process of contemplating ending temporary remote work arrangements with their employees and directing them to begin reporting back to work “in person”. Some remote work arrangements that were in place due to the COVID-19 pandemic have become quite lengthy. This may have led to employees developing certain expectations in respect of, and making significant alterations to, their day-to-day lives.

To this end, it is understandable that employees may need to make changes to their current personal affairs in response to a return to the workplace directive, and that doing so may take some time in certain situations. Moreover, it is also no secret that many employees simply enjoy working from home. In this regard, if the return to work plan can be approached in a way that mitigates against employees feeling negative about, or even resenting, the impending return, this would be beneficial to the workplace, and by extension, the employer. These key “considerations” are intended to assist employers with staying out of possible legal trouble as well as avoiding employee-pushback to a return to work mandate.

## 1. Consider Providing Advance Courtesy Notice

If possible, employers should provide employees with as much advance courtesy notice as is reasonably practical in the circumstances that they will be required to begin physically reporting for work again.

You will note we’ve described such notice a “courtesy” notice and not “working” notice. Courtesy notice is exactly that - a courtesy and not legally required. In contrast, an employer is required to give an employee sufficient working notice when changing a term of the employee’s employment without their consent to the change. Generally speaking, unless an employer previously represented to an employee that their terms of employment have been altered to allow for remote work regardless of the pandemic circumstances, then sufficient working notice need not be provided to direct an employee to return to the workplace. Accordingly, the courtesy notice should clearly remind employees that:

- They were hired on the mutual understanding that their work is to be performed at the workplace, rather than remotely;
- Remote work was only necessitated in response to public health directives and/or occupational

health and safety concerns and the level of risk the pandemic presented at a given time; and

- For these reasons, remote work has always been considered a temporary arrangement.

## 2. Consider a Temporary Hybrid Work Transition Period

Rather than pulling the plug on remote work entirely, if circumstances permit, employers could offer their employees a temporary transition period whereby employees could commence the return to the workplace process by working at the workplace part-time and remotely for the balance of their work. However, when offering this, employers should make it clear that employees should not interpret this offer of temporary hybrid work as being permanent, or creating entitlements, in any way. Instead, employers should communicate that this offer is being made with a view to being flexible while employees make any adjustments to their daily living as the return to the workplace process continues to unfold. Employers may also want to develop and outline objective eligibility criteria and/or a formal approval process in respect of the hybrid work transition period.

## 3. Consider Human Rights

The return to work directive could engage an employee’s human rights protections; more specifically, possibly the following protected grounds:

- Family status, for persons who are required to provide care to family members; or
- Physical disability, in the event that an employee’s return to the workplace would, at that time, present an unreasonable health and safety risk to them specifically, due to their extenuating medical circumstances rendering them highly vulnerable to COVID-19.

If so, employers must be mindful that a “one size fits all” approach to returning to the workplace may not be appropriate for these select employees. If not, an employer’s duty to accommodate will require the employer to modify its return to the workplace plans for those specific employees in any way reasonably possible that would address the given human rights situation and not cause undue hardship to the employer.

*Colin Fetter is a Partner and Practice Group Leader in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at [cfetter@brownleelaw.com](mailto:cfetter@brownleelaw.com).*

*Kyle Allen is an Associate in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at [kallen@brownleelaw.com](mailto:kallen@brownleelaw.com).*



**Tommy Leung**  
J.D.  
Associate,  
Borden Ladner  
Gervais LLP



**Emma Morgan**  
J.D.  
Associate,  
Borden Ladner  
Gervais LLP

Feature

# Inspect the Closet for Skeletons Before Termination

*Knowledge of misconduct may be the killer of after-acquired cause*

**T**erminating an employee's employment for cause is often a difficult decision for employers. It may be even harder when the employee's employment was initially terminated without cause, and the employee's misconduct during their employment is only discovered after termination.

## Doctrine of After-Acquire Cause

One potential option for the employer is to utilize the doctrine of after-acquired cause. The Supreme Court of Canada in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 discussed this doctrine, citing the Halsbury's Laws of England in doing so:

Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

That is, knowledge acquired by the employer after termination of an employee's employment may be relied on by the employer to justify termination for cause.

## After-Acquired Knowledge

An employer may still run into the obstacle of what actually constitutes after-acquired knowledge of misconduct.

The Alberta Court of Queen's Bench in *Nelson v. Champion Feed Services Inc.*, 2010 ABQB 409 noted that the decision of *Carr v. Fama*, 1989 CanLII 240, 40 BCLR (2d) 125 (BC CA) suggested that allegations of cause can be made after termination,

even where the employer knew of the misconduct at the time of dismissal but chose not to rely on it at the time.

However, the Court stated that the extent of the employer's knowledge at the time of dismissal and the circumstances surrounding the dismissal are all relevant to the credibility of the employer's subsequent allegation of just cause.

The Manitoba Court of Appeal recently commented on these concepts in *McCallum v. Saputo*, 2021 MBCA 62 (**McCallum**), and appears to support this proposition. The Court of Appeal cited the British Columbia Court of Appeal decision *Van den Boogaard v Vancouver Pile Driving Ltd*, 2014 BCCA 168, and stated that "it matters not whether the employer knew of the particular misconduct and chose not to rely on it at the time of dismissal, unless the employer both knew of and condoned the misconduct."

The obstacle then becomes the requisite level of knowledge required for a court to find that an employer *condoned* the employee's misconduct. In *Doucet v. Spielo Manufacturing Inc.*, 2011 NBCA 44, the New Brunswick Court of Appeal cited *McIntyre v. Hockin*, [1889] O.J. No. 36 (Ont. C.A.), stating:

It may be proper, however, to add a few words on the subject of condonation. When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses.

He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away.

The plaintiff in *McCallum* also argued that after-acquired cause is not available where an employer failed to conduct any investigation, citing *Cao v SBLR LLP*, 2012 CarswellOnt 9184, which stated:

If it is after-acquired just cause, the onus remains on the employer to prove why it was not known or not discovered at termination and how it was discovered subsequently, so that the court can evaluate the reasonableness and due diligence efforts of the employer in this regard and whether it may even constitute just cause.

The Court of Appeal in *McCallum* stated that it was not convinced the decision stands for that argument, and disagreed that it reflected the law in Manitoba.

Although the Court of Appeal in *McCallum* stated that "there is no duty to conduct an investigation prior to termination", it nonetheless provided some cautionary statements regarding inadequate investigations citing various decisions. First, inadequate investigations may result in the employer being unable to gather sufficient evidence to prove cause. Second, inadequate investigations have, in some instances, resulted in punitive

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## Inspect the Closet for Skeletons Before Termination

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damage awards against employers for the manner of dismissal where cause is not found to have been proven.

### Employer Takeaway

While the *McCallum* decision stated there is no duty to conduct an investigation for termination for cause in Manitoba, where an employer suspects an employee may have engaged in misconduct that may justify termination for cause, the employer should seriously consider conducting a thorough investigation and seek legal advice prior to terminating the employee's employment without cause. This is because an employer may potentially lose the

ability to argue after-acquired cause if the employee is successful in arguing that the employer knew of the misconduct and condoned it.

A more practical consideration is that the employer's credibility will likely be challenged when alleging after-acquired cause, and without a thorough investigation, an employer may not have sufficient evidence to make a cause argument. This is especially so where evidence collection may become more difficult after the employee departs, and in some cases, a failed cause argument may attract increased damages awards against the employer.

Accordingly, to reduce the risk of losing the ability to argue cause, and increase the chances of success for a cause argument, an employer should consider conducting a thorough investigation prior to termination if there is some suspicion of misconduct by the employee.

*Tommy Leung is an Associate with Borden Ladner Gervais LLP and can be reached at [toleung@blg.com](mailto:toleung@blg.com).*

*Emma Morgan is an Associate with Borden Ladner Gervais LLP and can be reached via email at [emorgan@blg.com](mailto:emorgan@blg.com).*

**Philip H. Gennis, J.D., CIRP, LIT**  
Senior Principal



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# The Modern Performance Management System

## Performance appraisal vs performance management

### Looking back

Performance management is certainly not new. Long before we knew what it was, managers and supervisors were evaluating the performance of their workforce. But during the 1920s as business and management evolved, the owners and leaders of these nascent empires sought to maximize overall performance and operational efficiency. As time went on, these evaluation systems became more complex and for many managers, more cumbersome.

During the 1950s, there was a move to start rating employees based on personality traits like job knowledge, loyalty and trustworthiness. However, that only measured the possibility of performance versus the real deal. That led the way in the 1960s to more formal employee appraisal systems and yearly meetings to review their progress. Companies also started the beginnings of what we know as 'management by objectives' and tying employee evaluations to how well their performance contributed to the missions and goals of the organization.

Since then, it feels like we've been on the performance appraisal merry-go-round. Sometimes we stop at psychometrics and rating scale, then we screech to a halt at 360-degree feedback and other forms of multi-stakeholder feedback loops. Today many organizations have gotten rid of the formal process altogether and focus on continuous feedback processes and systems.

### What are you doing now?

Certain approaches to performance appraisal such as the

ranking method, paired comparison, the grading method and the critical incidents method, among others, are often referred to as traditional methods.

Traditional methods tend to measure an employee's past performance and focus on assessing employee personality traits such as initiative, dependability and leadership potential. Modern methods weigh job achievements more heavily, regardless of the employee's personality traits, which is thought to be a less biased approach.

### Is it time to change?

If what you're doing is working right now, then maybe keep doing what you're doing. But even if you're satisfied with your performance management system and approach, the world around you is changing. In fact, it already has. At least your workforce has. They are now likely younger, more mobile and more technologically adept. Also, this cadre of younger workers want ongoing feedback and communication, acknowledgement when they do a good job and the opportunity to move up in the organization or they will leave.

### Performance management vs performance appraisal

Maybe the place to change is in your thinking. Some experts suggest shifting from performance appraisal to performance management. They sound the same but there's a big difference. Performance appraisal at its essence is based on the theory that you can motivate the real stars of your organization with some form of bonuses and promotions and compensate everyone else based on their

competence. Performance management takes a different approach. It works on the principle that everyone can improve, and that management's job is to identify what they need (i.e., training for example) and then encourage them to grow.

The good news is that you can have a blend of both in your new or existing performance appraisal or management system. You can still do yearly reviews, but you would supplement those with coaching or mentoring. Organizations can also be mindful about how much they invest in employee training or retraining as well, but smart employers build this into their budget and see it as a necessary and vital part of people management. There's also a distinction between the two approaches when it comes to data. In older, more traditional systems, there is a tendency to be data-driven. Performance management focuses on using the data but also considering individual employees and their differences when applying the data to reviewing their performance.

### Looking ahead

When you are ready to change, here are some areas to consider. These are not all really new, but they have become the gold standard of practices in this field. Leading the pack is the old/new 'management by objectives'. The reason that it's still around is that it works. For many organizations, it's because the whole team gets to set the objectives and goals that they collectively want to meet. 360-degree feedback is another oldie but goodie, relatively speaking. Getting feedback

*continued next page...*



## The Modern Performance Management System

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from top to bottom and inside and outside the organization can only help identify the good, the bad and sometimes the ugly.

Behaviourally Anchored Rating Scales (BARS) are another way that some organizations measure performance. They compare their employees' performance against a specific or predefined set of behaviour traits which are linked to specific numeric values or ratings. There are also the psychological appraisal processes which make a judgement about how well an employee will perform in the future based on a psychological assessment. It looks at things like interpersonal skills, emotional intelligence and other factors such as leadership skills and cognitive abilities.

If you really want to change, you may want to consider agile performance management. Agile performance management considers performance and development throughout the year versus the old once a year performance appraisal system. There is an ongoing dialogue to and from an employee and their manager and it encourages employees to try to meet personal and

organization objectives at the same time. The major benefit of this approach is that employees seem to love it. One study found that almost 50% of employees reported that they "work more effectively" under an agile approach. Even managers who normally hate employee appraisals seem much happier and report an increase in individual and overall productivity from this way of doing performance reviews.

*Members Quarterly Staff Writer*

**Gail R. Boone CEC, PCC, EFC**

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36 Stage Road, Enfield, Nova Scotia Canada

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[gailboone@ns.sympatico.ca](mailto:gailboone@ns.sympatico.ca)

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# Ontario Employers Face More Changes with Bill 88

More news on *Digital Platform Workers' Rights and Electronic Monitoring*



**Dan Palayew**  
LL.B.  
Partner,  
Borden Ladner  
Gervais LLP



**Odessa O'Dell**  
J.D.  
Associate,  
Borden Ladner  
Gervais LLP

On April 11, 2022, Bill 88, *Working for Workers Act, 2022* received Royal Assent. It established the new *Digital Platform Workers' Rights Act, 2022* ("DPWRA"), and an amendment to the *Employment Standards Act, 2000* ("ESA") requiring employers to prepare an electronic monitoring policy.

## **Digital Platform Workers' Rights Act, 2022**

The DPWRA is a first-in-kind piece of legislation, which introduces a bundle of important rights for workers who perform "digital platform work," which is defined as "the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform." The term "operator" includes "a person that facilitates, through the use of a digital platform, the performance of digital platform work by workers" but does not include temporary help agencies.

The Act also provides digital platform workers with considerable rights to information. For example, within twenty-four hours of being granted access to the digital platform, operators will have to advise workers how pay is calculated, whether tips or gratuities are collected and how, as well as information regarding the operator's established pay period.

Operators must also communicate information regarding the factors used to determine whether work assignments are offered to workers, and a description of how those factors are applied. Additionally, an explanation of the performance rating system, if applicable, and its impact on a worker must also be provided. The new legislation also imposes stringent record-keeping requirements on operators.

Finally, the DPWRA prevents operators from intimidating, penalizing or threatening to intimidate or penalize a worker for asking any person to comply with the Act, for making inquiries about their rights under the Act, or for taking steps to exercise a right under the Act.

The DPWRA will come into force on a day yet to be named by proclamation.

## **Takeaways for Employers**

First, it is important to note that the DPWRA will apply equally to any worker performing digital platform work. This includes employees, but also contractors, which represents an important expansion of statutory employee-like rights to a broader range of workers.

Employers should begin to create policies or protocols that conform to the various requirements outlined in the Act. Most importantly, employers will need to consider how the requirements prescribed by the DPWRA will affect their accounting practices, as well as their information policies and record-keeping procedures.

Finally, it is important to note that the DPWRA generally parallels the ESA, particularly with respect to its oversight and enforcement mechanisms. It will prohibit operators and workers from contracting out or otherwise waiving any of the workers' rights established by the Act, unless one or more provisions in a contract or in another Act that directly relate to the same subject matter as a worker right provide a greater benefit to a worker than the worker right provided in the DPWRA.

## **Introduction of Electronic Monitoring Policies**

The most important amendment to the ESA brought on by Bill 88 is the addition of Part XI.1, which imposes new requirements

on employers as it pertains to the electronic monitoring of employees.

## **Electronic Monitoring Policy**

The new section to the ESA requires employers that employ 25 or more employees on January 1 of a given year, to ensure it has a written policy in place for all employees, no later than March 1 of that year that addresses to electronic monitoring of employees.

For the purposes of initial compliance, prescribed employers have until October 11, 2022 to comply with this requirement.

Under the new provisions of the ESA, the written policy must:

- indicate whether the employer electronically monitors its employees;

- a description of how, and in what circumstances, the employer may electronically monitor employees; and
- set out the purposes for which the information obtained through electronic monitoring may be used by the employer.

The written policy must also highlight the date the policy was prepared, and the date any changes were made to the policy.

In addition, employers who are required to have an electronic monitoring policy must provide a copy of the policy to each employee within thirty days of the day on which the employer is required to have implemented the policy, as well as within thirty days of any changes being made to an existing policy. New employees should also receive a copy within thirty days of commencing work.

Finally, employers must retain, or arrange for some other person to retain, copies of every written policy on electronic monitoring for three years after the policy ceases to be in effect.

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Feature



**Michelle Phaneuf**  
P.Eng., ACC  
Partner, Workplace  
Fairness West

# The Six Types of Working Relationships

*Move from dysfunctional to trusted*

Our relationships in the workplace often reflect how successful we will be in reaching our goals. Directed individuals may feel that this is not the case, and they need only to push themselves and others harder to ensure the goal will be achieved. Workplaces are shifting away from this thinking and defining successful cultures as having the ability to achieve a goal while maintaining strong working relationships – the definition of collaboration. Collaboration may not always be possible. It may also look different depending on the functionality of our working relationships.

Consider the different types of relationships that we have with others in the workplace. I developed a continuum to represent this perspective, with relationships on the left side such as dysfunctional (1), avoid/separate (2), co-existing (3), being more fractured and moving to relationships on the right such as transactional (4), collaborative (5), and trusted (6) being stronger.

Many of the relationships I see in my role as a conflict resolution professional may be on the left side of the continuum in the dysfunctional or avoid zone. Sometimes working with a facilitator or conflict coach can support employees on the left to shift their relationship to the middle of the continuum to co-exist or have a more transactional relationship. The organization may intervene and separate employees to ensure that individuals have a psychologically safe workplace. Depending on working roles and expectations, avoiding interactions may not be a feasible solution for the long term. When we have strong working relationships in the collaborative or trusted zone, it is often with colleagues who have a similar perspective or where trust is high, making cooperation easy and straightforward.

There is no right or wrong place to be on the continuum; it is a tool to build awareness of where our working relationships are and where we might want them to be. If we work comfortably in the transactional area and our work only requires this type of interaction, then all is well. If we are in a role

that requires constant and extensive collaboration, then we need to reach beyond transactional relationships. But what if we encounter formidable barriers to collaborating or building trust?

Adam Kahane, in his book *Collaborating with the Enemy*, sees it like we are all trying to get something done that really matters to us. To do this, we need to work with others. But these others include people we don't agree with or like or trust, so working with them seems impossible — like collaborating with the enemy. In our workplaces, we don't often get to choose whom we work or interact with. We may need to collaborate extensively regardless of our relationship dynamics to get the job done.

Kahane believes that the only way to get things done when we don't have strong working relationships is to abandon harmony, agreement and control, and to learn to work with discord, experimentation and genuine co-creation. This is a new approach to collaboration — stretch collaboration.

How do we get there? Abandoning control when we don't trust others may be against our human nature and not aligned with how our brains work. Stretch collaboration will require support from others - neutral parties who are not invested in the outcome, but can create the space needed for achieving collaboration. Individuals with training in conflict resolution can bring a process to build understanding and uncover interests and values. These individuals can support participants to find solutions to the complex issues that face our workplaces and society regardless of the type of working relationship they may have. Stretch collaboration is stepping successfully into the unknown and our next important workplace challenge.

*“Walker, there is no path. The path is made by walking.” - poet Antonio Machado.*

*Michelle Phaneuf is Partner at Workplace Fairness West and can be reached via email at phaneuf@workplacefairnesswest.ca.*

Feature

## Ontario Employers Face More Changes with Bill 88 ... *concluded from page 10*

### Takeaways for Employers

Although the new addition to the ESA may initially seem onerous to employers, it is important to note that nothing in the amendment to the legislation affects an employer's ability to engage in electronic monitoring of employees in Ontario.

Employers who already engage in electronic monitoring should

review and update existing policies to ensure they are line with the new requirements of the ESA. Similarly, affected employers who do not currently have electronic monitoring policies should begin reviewing their electronic monitoring practices in anticipation for the disclosure required above, and should consult with legal counsel to draft an electronic monitoring

policy. When preparing or revising such policies, privacy considerations should also be kept in mind.

*Dan Palayew is Partner/Regional Leader, Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com.*

*Odessa O'Dell is a Senior Associate with Borden Ladner Gervais LLP and can be reached at oodell@blg.com*

Feature cont'd

# Legal Updates from Atlantic Canada

## Legislative changes in Employment and Labour Law



**Kyle MacIsaac**  
LL.B.  
Partner  
Mathews Dinsdale  
Clark LLP



**Caroline Spindler**  
J.D.  
Associate,  
Mathews Dinsdale  
Clark LLP

Feature

While extensive focus has been on COVID-19, lawmakers have introduced and passed legislation impacting workplaces. Here are some legislative changes impacting Atlantic Canada employees.

In PEI, a major change comes in the form of Bill No. 118, *Non-disclosure Agreements Act*, which regulates the content and use of non-disclosure agreements. The Act prohibits a party who committed, or who is alleged to have committed harassment or discrimination from entering into non-disclosure agreements with the complainant where the agreement has the purpose or effect of concealing the details relating to a complaint of harassment and discrimination, unless the agreement is expressed with and preference of the complainant. The Act also places limits on the enforceability of the agreement, such that the agreement will only be enforceable where the complainant has a reasonable opportunity to receive independent legal advice; there have been no undue attempts to influence the complainant regarding the decision to include a requirement not to disclose any material information; the agreement doesn't adversely affect the health or safety of the third party or public interest; the agreement includes an opportunity for the complainant to decide to waive their own confidentiality in the future and a process for doing so; and the agreement is of a limited duration. Agreements must be written in plain language and all the requirements of the Act also apply to non-disparagement agreements that have the purpose or effect of concealing details relating to an allegation or incident of harassment or discrimination. The Act makes it an

offence to enter into agreements which do not comply with the Act and imposes fines of between \$2,000 and \$10,000 per offence. The Act came into force on May 17, 2022.

Changes in employment standards legislation in PEI are focused on pay. Bill No. 119, *An Act to Amend the Employment Standards Act*, related to pay transparency and prohibits employers from seeking pay history information about an applicant. However, voluntary disclosure is permitted and employers can seek information about ranges of pay for comparable positions. Employers are required to include the expected pay or the range of expected pay for a position in a public job posting. The bill also includes anti-reprisal provisions for pay transparency-related conduct by employees and allows employees to make a complaint for failure to comply. The bill came into force on June 1, 2022.

Additionally, Bill No. 101, *An Act to Amend the Employment Standards Act*, would provide employees with three days paid and seven days unpaid mental illness leave to allow employees to care for a spouse or child who is experiencing a mental illness. The bill was given first reading on March 3, 2021.

In Nova Scotia, some private members bills were introduced proposing changes to labour standards and workers' compensation legislation, as well as attempting to legislate the use of non-disclosure agreements.

On April 7, 2022, private members' bill, Bill No. 144, *Non-disclosure Agreements Act*, was given first reading. The content of Bill No. 144 is nearly identical to Prince Edward Island's *Non-disclosure Agreements Act*,

prohibiting parties from entering into agreements, except in certain circumstances; limiting the enforceability of the agreements; and imposing fines for non-compliance.

Bill No. 75, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code, Respecting Sick Leave*, is a private member's bill which, if passed, would prohibit employers from disciplining employees for asking the employer to comply with the *Labour Standards Code* or regulations, as well as provide employees with up to ten days of paid leave per year for personal illness, injury or medical emergency for themselves or personal injury, medical emergency or death of a family member. Employers would be prohibited from requiring the production of a note from a physician to substantiate the leave. Bill No. 75 was given first reading on November 2, 2021.

In addition to the proposed paid sick leave, Bill No. 152, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code, to Provide Paid Leave for Events of Domestic Violence and Other Emergencies*, was introduced and would provide employees with ten (10) days of leave for emergencies, including emergencies related to domestic violence, with five (5) of the ten (10) days paid. Bill No. 153, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code, Respecting Organ and Tissue Donation Leave* was also introduced and would provide up to thirteen (13) weeks, one week paid and remainder unpaid, of leave for organ or tissue donation. Employees would be required to provide a medical

*continued next page...*

## Legal Updates from Atlantic Canada

... concluded from page 12

certificate upon the request of the employer. Both private members' bills were given first reading on April 8, 2022.

Another private members bill, Bill No. 76, *An Act to Amend Chapter 246 of the Revised Statutes, 1989, the Labour Standards Code, to Stimulate the Economy and Reduce Income Inequality*, would see minimum wage increased to \$15.00 per hour; eliminate a special wage rate for inexperienced workers; add a definition of "living wage"; require the development of a plan to have all employers pay a living wage to their employees; require the Province and employers who contract with the Province to pay employees a living wage; and deem a discontinuation or

reduction in a benefit, service or privilege to be a reduction in wages. Bill No. 76 was given first reading on November 2, 2021.

With respect to workers' compensation legislation, three (3) private members bills were introduced in October 2021, expanding the types of cancers presumed to be work-related for firefighters; expanding the definition of "front-line or emergency-response worker" for provisions respecting presumptive benefits for workers diagnosed with post-traumatic stress disorder; and providing earnings-replacement benefits for former workers of the Cape Breton Development Corporation's underground coal mine beyond the age of 65.

Legislators in New Brunswick and Newfoundland & Labrador have been relatively quiet on the labour and employment front. As the year progresses, employers should continue to monitor these bills, as well as any new legislation to see if they make their way into law.

*Kyle MacIsaac is a Partner with Mathews, Dinsdale Clark LLP and can be reached via email at kmacisaac@mathewsdinsdale.com.*

*Caroline Spindler is an Associate with Mathews, Dinsdale Clark LLP and can be reached at cspindler@mathewsdinsdale.com.*



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Tim Kessler  
CEO  
inHabitWellness.ca

ASK the EXPERT

# What's Missing in High Performance?

*Don't overlook recovery*

**Q** | *We've noticed since the pandemic that our top performers are experiencing the side effects of high stress and burnout. How would you suggest dealing with this issue?*

**A** | *Leaders should consider providing skills training that enables their people to recover from the side effects of stress while they work.*

Yes, you read that right, work and recovery can exist together.

Keeping work and recovery separate is like working out without resting between sets or a chef who doesn't sharpen their knife. Willpower and skill will only take you so far before pushing the grind becomes hazardous to health and performance.

The reality is that stress is inevitable, whether it comes from work or personal reasons. Stress therein is eventually going to impact the workplace in a significant way (i.e., absenteeism, presenteeism, low engagement, the bottom line, etc.).

Why not shore up the workforce with a higher standard of preparedness for recovering from stress as if it was just as important as other work-related skills?

To do so, it is important to understand what is going on in the nervous system during periods of high performance and

waves of high stress. When one recognizes the physiological need for balancing exertion (work) with periods of recovery, it is easier to see how periods of recovery can be leveraged to boost well-being and performance over the course of an average workday.

Contrary to traditional work ethics, where work is solely for work and time off is for recovery, the human nervous system is designed for continual rises and falls in cognition, energy levels, the need for recovery and much more. Examples of this can be seen by anyone who knows what it is like to hit that afternoon 'wall' or by recognizing the hours of the workday where they feel most productive.

In the short-term, rises and falls in cognition and energy levels are normal, however when under high pressure work and life stress, pushing through the daily grind begins to have bigger consequences:

- Fatigue or irritability become the norm.
- Unresolved stress disrupts cognitive abilities and decision making.
- Immune systems start breaking down.
- Muscle tension and risk for injury rises.
- Mental health issues start to surface.
- Work and life boundaries begin to blur.

High performance often begets high stress. Therefore, if high performers want to stay at the top of their game, balancing high stress with skill in high-efficiency recovery is all but necessary for long-term success.

High efficiency recovery might look like:

- Taking micro-breaks to collect thoughts and contemplate priorities.
- Utilizing the power of the breath to release stress or cultivate focus.
- Short bouts of movement to release muscle tension or boost energy.
- Changing postures more frequently to stay limber while avoiding repetitive strain.
- A daily routine built to optimize sleep quality.

Some of these practices may seem too simple to be effective. The truth is that they are simple behaviours that trigger sophisticated responses in the nervous system. There is definitely some science to backing these strategies. Feel free to contact me should you wish to receive additional information in this area.

All in all, building skills in high-efficiency recovery is much like building any other skill—they are only as good as the habit they become. Repetition and proficiency are key, so beyond the benefits that can be found in one dose of recovery is a mountain of benefits that come from training and practicing the skill over time.

*"There is virtue in work and there is virtue in rest. Use both and overlook neither."*

– Alan Cohen

*Tim Kessler is Workday Performance Coach and CEO of inHabitWellness.ca and Workovery.com and can be reached via email at [timk@inhabitwellness.ca](mailto:timk@inhabitwellness.ca).*



**Charmaine Hammond**  
CSP, MA  
President,  
Hammond International  
Inc.

Feature

# When Workplace Collaboration Goes Sideways

*Keep your star performers from leaving*

**W**e've all been there - a collaboration or project committee that worked well until a key player left, the purpose became blurry or things went sideways and off track. Collaboration and communication breakdowns happen often. In fact, Salesforce reported that in one survey, 86% of employees and executives cited lack of workplace collaboration or ineffective communication for failures in the workplace. The cost of ineffective collaborations and communication breakdowns can be excessive for tangible expenses as well as workplace relationships.

Most organizations that I have worked for believe that communication and collaboration are essential for business success. Queens University of Charlotte reported that approximately 75% of employers ranked collaboration and teamwork as being "very important", yet pointed out that only 18% of employees get communication evaluations at their performance reviews. It is important that employers strive to not only review an employee's collaboration and communication skills, but that they also provide training opportunities to support the advancement of these skills across teams. This will help keep collaborations from falling off the tracks.

There are many reasons that collaborations go sideways. Some of the common challenges include:

- Choosing the wrong partners (wrong fit) to collaborate with, the wrong timing to pursue the collaboration and not

taking the time to build relationships and clarity around the purpose of the collaboration.

- Personality and working style differences between the collaboration partners.
- Lack of agreement or clarity on the vision, purpose and reason for collaboration.
- Expectations that have not been voiced, clarified or met, and too many unchecked assumptions.
- Finances (disagreement related to finances) or lack of finances to effectively support the collaboration.
- Communication, miscommunication or lack of communication.
- Conflict that is not addressed or that is poorly managed.

There is good news. The majority of these challenges can be avoided and planned for. Teams that take time to effectively plan, build trust and relationships and address issues promptly will be able to focus on the goals and project instead of the list of collaboration challenges.

Here are a few tips to ensure collaborations remain healthy, respectful and on track:

- **Put collaboration agreements in writing**- Develop terms of references, working agreements, team charters or collaboration agreements in writing. Review and modify these agreements regularly.
- **Communicate... communicate... communicate.** Resolve communication issues and conflict promptly and effectively to ensure that the collaboration is not impacted.

- **Avoid assumptions**- If assumptions are made, take the time to clarify, understand and correct them.
- **Track agreements in meeting minutes or through a decision tracker.** This helps the partners stay up to date and prevents old issues from resurfacing.
- **Complete Review and Learns** (What went well? What was a challenge? What did you learn? What will you do differently next time?)

When you take time to effectively create collaborations, nurture relationships and manage issues that arise, these can also positively impact employee retention. Reports indicate that organizations that communicate effectively are 4 times more likely to retain their best employees.

The biggest asset for any organization is its workforce. When employees collaborate, combine their knowledge and skills and share their talents, positive results are bound to happen. To achieve success, retain employees and stay ahead of the competition, ensure that your workplace fosters, models and supports a healthy culture of collaboration, teamwork and resilience.

*Charmaine Hammond, CSP is a business keynote and workshop speaker, entrepreneur, author and educator who teaches and advocates the importance of developing trust, healthy relationships and collaboration in the workplace.*

*She is President of Hammond International Inc. and can be reached via email at [charmaine@hammond-group.biz](mailto:charmaine@hammond-group.biz).*

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