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**EMPLOYMENT LAWYERS**

*Your Work is Our Business*



## **Employer Protection from Employee-Related Liability**

**Independent Diagnostic Clinic's Association Conference**  
Le Parc Conference Centre, Richmond Hill, Ontario

September 8, 2017

***Presenter – Ronald S. Minken, B.A. (Hon.), LLB***

# DISCLAIMER

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# BIO – Ron Minken, B.A. (Hon.), LL.B.

Email: [rminken@minken.com](mailto:rminken@minken.com)



Ron heads Minken Employment Lawyers – a Global Award Winning Employment & Labour Law Boutique located in Markham in the GTA. With 28 years of experience as a lawyer, and mediator, he is well known by employees and employers, and the business community, locally and internationally, as heading a leading edge team, and as an energetic and passionate proponent for HR and Employment & Labour Law. Since 2008, Ron has been recognized as one of Canada's

Top Employment Lawyers by *Canadian HR Reporter* in its *Canada's Employment Lawyers Directory*. Ron regularly contributes to legal, business and HR publications such as *Canadian HR Reporter*, *Canadian Employment Law Today*, *Law Times* and *Magazine for Business* and has been quoted in publications such as *The Toronto Star* and *The Financial Post*.

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# ROADMAP



- Bill 148: *Fair Workplaces, Better Jobs Act, 2017*
  - Changes to the *Employment Standards Act, 2000*
- Human Rights & Accommodation in the Workplace
- High Risk Areas of Liability & Cost
- Questions & Answers

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**MINIMUM WAGE \***

	Current	Oct. 1/17	Jan. 1/18	Jan. 1/19
<b>General Minimum Wage</b>	\$11.40/hr	\$11.60/hr	\$14.00/hr	\$15.00/hr
<b>Students</b> under 18, working less than 28 hrs/week when school is in session or working during a school holiday	\$10.70/hr	\$10.90/hr	\$13.15/hr	\$14.10/hr
<b>Liquor Servers</b>	\$9.90/hr	\$10.10/hr	\$12.20/hr	\$13.05/hr
<b>Homeworkers</b>	\$12.55/hr	\$12.80/hr	\$15.40/hr	\$16.50/hr

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**EQUAL PAY FOR EQUAL WORK - Revised\***

**42.1(1)** No employer shall pay an employee at a rate of pay **less** than the rate paid to another employee of the employer because of a **difference in employment status** when,

- (a) they perform **substantially the same kind of work in the same establishment**;
- (b) their performance requires **substantially the same skill, effort and responsibility**; and
- (c) their work is performed under **similar working conditions**.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**EQUAL PAY FOR EQUAL WORK – Revised\***

**Exception**

**42.1(2)** Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,

- (a) a **seniority** system;
- (b) a **merit** system;
- (c) a system that measures earnings by **quantity or quality of production**; or
- (d) any other **factor** other than sex or employment status.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**EMPLOYEE MISCLASSIFICATION - NEW\***

**No treating as if not employee**

**5.1 (1)** An employer shall not treat...a person who is an employee of the employer as if the person were not an employee under this Act.

**Onus of proof**

**(2)** ...if,...an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer.



BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**REQUEST FOR CHANGES TO SCHEDULE OR WORK  
LOCATION – NEW\***

**21.2(1)** An employee who has been **employed** by his or her employer for **at least three months** may submit a **request**, in **writing**... **requesting changes to the employee's schedule or work location.**

**Receipt of request**

**(2)** An employer who receives a request...shall,

(a) **discuss** the request with the employee; and

(b) **notify** the employee of the employer's **decision** within a **reasonable time** after receiving it.

**Denial of request**

**(4)** If an employer denies the request...**must include reasons**...

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**SCHEDULING - Revised**

**Three hour rule**

**21.3 (1)** An employer shall **pay** an employee wages equal to the **employee's regular rate [as opposed to minimum wage]** for **three hours of work** if the employee,

- (a) **regularly works more than three hours a day;**
- (b) **is required to work;** and
- (c) **works less than three hours, despite being available to work longer.**

**Exception**

**(2)** Subsection (1) does **not apply** if the employer is unable to provide work for the employee because of **fire, lightning, power failure, storms** or similar causes beyond the employer's control that result in the stopping of work.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**MINIMUM PAY FOR BEING ON CALL - NEW**

**21.4(1)** An employer shall **pay** an employee wages equal to the employee's **regular rate** for **three hours of work** if the employee is **on call** to work and the employee,

(a) is **not required to work**; or

(b) is required to work but works **less than three hours**, despite being available to work longer.

**Limit**

**(2)** Subsection (1) only requires an employer to pay an employee a **minimum of three hours of pay during a twenty-four hour period beginning at the start of the first time during that period that the employee is on call**, even if the employee is on call multiple times during those twenty-four hours.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**SCHEDULING: RIGHT TO REFUSE ON CALL - NEW**

**21.5(1)** An employee has the **right to refuse an employer's request or demand to work or be on call** on a day that they were **not scheduled** to work or be on call if the request or demand is made ***less than 96 hours [4 days]*** before the time he or she would commence work or commence being on call, as applicable.

**Exception**

**(1.1)** Subsection (1) **does not apply** if the employer's request or demand to work or be on call is,

- (a) to deal with an **emergency**;
- (b) to remedy or reduce a **threat to public safety**; or
- (c) made for such **other reasons** as may be prescribed.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**SCHEDULING: SHIFT CANCELLATION - NEW**

**21.6(1)** An employer shall **pay** an employee wages equal to the employee's **regular rate for three hours of work** if the **employer *cancels* the employee's scheduled day of work or scheduled on call period *within 48 hours* before the time the employee was to commence work or commence being on call**, as applicable.

**Meaning of cancellation**

**(2)** [...] a scheduled day of work or scheduled on call period is **cancelled if the *entire day* of work or on call period is cancelled** but **not if the day of work or on call period is shortened or extended.**

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**OVERTIME PAY - *Revised***

**22 (1.1)** If an employee has **two or more regular rates for work performed for the same employer in a work week,**

- (a) the employee is entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold; and
- (b) the **overtime pay** for each hour referred to in clause (a) is one and one-half times the regular rate that ***applies to the work performed in that hour.***

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**RIGHT TO VACATION - Revised\***

**33(1)** An employer shall give an employee a **vacation** of,

- (a) **at least two [2] weeks** after each vacation entitlement year that the employee completes, if the employee's period of employment is **less than five years**; or
- (b) **at least three [3] weeks** after each vacation entitlement year that the employee completes, if the employee's period of employment is **five [5] years or more**.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**VACATION PAY - Revised**

**35.2** An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34, equal to at least,

(a) **4 per cent of the wages**, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is **less than five years**; or

(b) **6 per cent of the wages**, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is **five years or more**.



BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**PERSONAL EMERGENCY LEAVE - Revised\***

**50(1)** An employee is entitled to a **leave of absence** because of any of the following:

1. A **personal illness, injury or medical emergency**.
2. The **death, illness, injury or medical emergency** of an individual described in subsection (2).
3. An **urgent matter** that concerns an individual described in subsection (2).

**Limit**

**(5)** Subject to subsection (5.1), an employee is entitled to take a total of **two days of paid leave** and **eight days of unpaid leave**...in each calendar year.

**(5.1)** If an employee has been employed by an employer for **less than a week**, the following rules apply:

1. The employee is **not entitled to paid days of leave** under this section...

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**PERSONAL EMERGENCY LEAVE – Revised\***

**Evidence**

**(10)** Subject to subsection (11), an employer may require an employee who takes leave under this section to **provide evidence reasonable in the circumstances** that the employee is entitled to the leave.

**Same**

**(11)** An employer *shall not* require an employee to provide a **certificate** from a qualified health practitioner as evidence under subsection (10).

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

**DOMESTIC OR SEXUAL VIOLENCE LEAVE - NEW\***

**Entitlement to Leave**

**49.7 (2)** ...employed by an employer for at least **13 consecutive weeks** is entitled to a **leave of absence *without pay*** if the ***employee or a child of the employee experiences domestic or sexual violence, or the threat of domestic or sexual violence***...for any of the following purposes:

1. To **seek medical attention**...in respect of a physical or psychological injury or disability caused by the domestic or sexual violence.
2. To **obtain services from a victim services organization**
3. To **obtain psychological or other professional counselling**
4. To **relocate** temporarily or permanently.
5. To **seek legal or law enforcement assistance**, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence.
6. Such **other purposes as may be prescribed**.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**DOMESTIC OR SEXUAL VIOLENCE LEAVE – NEW\***

**Exception**

**(3)** Subsection (2) **does not apply** if the domestic or sexual violence is **committed by the employee**.

**Length of leave**

**49.7(4)** An employee is entitled to take, in each calendar year,  
(a) **up to 10 days** of leave under this section; **and**  
(b) **up to 15 weeks** of leave under this section

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**FAMILY MEDICAL LEAVE - Revised**

**Entitlement to Leave**

**49.1(2)** An employee is entitled to a leave of absence *without pay* of *up to 27 weeks* to provide care or support to an individual described in subsection (3) if a qualified health practitioner issues a certificate stating that the individual has a **serious medical condition with a significant risk of death occurring within a period of 52 weeks** or such shorter period as may be prescribed.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**PREGNANCY LEAVE – Revised\***

**End of pregnancy leave**

**47(1)** An employee's pregnancy leave ends,

(a) if she is **entitled** to parental leave, 17 weeks after the pregnancy leave began;

(b) if she is **not entitled** to parental leave, on the day that is the later of,

(i) **17 weeks after the pregnancy leave began, and**

(ii) **12 weeks after the birth, still-birth or miscarriage.**

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**PARENTAL LEAVE - *Revised\****

**When leave may begin**

**48(2)** An employee may **begin** parental leave no later than **78 weeks [18 mo.]** after the day the child is born or comes into the employee's custody, care and control for the first time.

**End of parental leave**

**49(1)** An employee's parental leave **ends 61 weeks [14 mo.]** after it began, if the employee also took pregnancy leave and **63 weeks [14.5 mo.]** after it began, otherwise.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**CHILD DEATH LEAVE - Revised**

**Entitlement to leave**

**49.5(2)** An employee who has been **employed** by an employer for at least **six consecutive months** is entitled to a **leave of absence without pay of up to 104 weeks [24 mo.]** if a **child of the employee dies**.

**Exception**

**(3)** An employee is **not entitled** to a leave of absence under this section if the employee is **charged with a crime in relation to the death of the child** or if it is probable, considering the circumstances, that **the child was a party to a crime in relation to his or her death**.



BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**CRIME-RELATED CHILD *DISAPPEARANCE* LEAVE – Revised**  
**Entitlement to leave**

**49.6(2)** An employee who has been **employed** by an employer for **at least six consecutive months** is entitled to a **leave of absence without pay of up to 104 weeks [24 mo.]** if **a child of the employee disappears and it is probable**, considering the circumstances, **that the child disappeared as a result of a crime.**

**Exception**

**(3)** An employee is **not entitled** to a leave of absence under this section if the **employee is charged with the crime** or if it is probable, considering the circumstances, **that the child was a party to the crime.**

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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***REPEALED!***

***ESA, 2000***

**Steps required before complaint assigned**

**96.1 (1)** The Director shall not assign a complaint to an employment standards officer for investigation unless the complainant has taken the steps specified by the Director to facilitate the investigation of the complaint.

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**PUBLICATION RE NOTICE OF CONTRAVENTIONS - *Revised***

**Publication re notice of contraventions**

**(6.2)** If a person, including an individual, is deemed under subsection (5) to have contravened this Act after being issued a notice of contravention, **the Director may publish or otherwise make available to the general public the name of the person, a description of the deemed contravention, the date of the deemed contravention and the penalty for the deemed contravention.**

**Internet publication**

**(6.3)** Authority to publish under subsection (6.2) includes authority to **publish on the Internet.**

BILL 148: *FAIR WORKPLACES, BETTER JOBS ACT, 2017*  
- Changes to the *Employment Standards Act, 2000*

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**INCREASED ENFORCEMENT - NEW**

Ontario is planning on hiring up to **175 more Employment Standards Officers**, allowing it to inspect 1 out of every 10 workplaces.

There will also be a **program launched to educate employees, and small and medium-sized businesses** on their rights and obligations under the *Employment Standards Act, 2000*.

# HUMAN RIGHTS IN THE WORKPLACE

## **ONTARIO *HUMAN RIGHTS CODE***

### **Employment**

**5(1)** Every person has a right to equal treatment with respect to **employment** without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, **gender identity, gender expression**, age, record of offences, marital status, **family status** or **disability**.

# ACCOMMODATION: ILLNESS & DISABILITY

## *HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD V. FAIR, 2016 ONCA 421*

**Employee was reinstated, with back pay, 14 years after being terminated instead of having her disability accommodated**

“Failing to accommodate a person’s disability-related needs is therefore a violation of s. 5 of the Code, which **prohibits discrimination against a person because of disability**, if that person’s needs can be **accommodated without undue hardship...**”

“The.” **assessment of a person’s disability-related needs and the appropriate accommodation to be made is a highly individualized process**

“It is the **employer’s onus** to establish that it cannot **accommodate** the employee’s disability-related needs without experiencing **undue hardship**”

# ACCOMMODATION: RELIGIOUS BELIEFS

## *ISLAM V. BIG INC., 2013 HRTO 2009*

Three Muslim cooks were required to eat pork, eat while fasting, and the employer instituted an English only rule in the kitchen. The HRTO found that the employees were discriminated against on various grounds, including creed, and were awarded a total of \$98,592 in damages.

“the Supreme Court of Canada held that, to **establish that a requirement that disadvantages a group protected by human rights legislation is “reasonable”, the [Employer] must show that the requirement was reasonably necessary to the accomplishment of a legitimate purpose related to the enterprise.**”

# ACCOMMODATION: CHILD & ELDER CARE

***MISETICH V. VALUE VILLAGE STORES INC., 2016 HRTO 1229***

**Childcare & eldercare obligations – Duty to accommodate based on family status - *not necessarily grounds for accommodation***

“In order to establish family status discrimination in the context of employment, the **employee will have to do more than simply establish a negative impact on a family need. The negative impact must result in *real disadvantage* to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee’s work.** For example, a workplace rule may be discriminatory if it puts the employee in the position of having to choose between working and caregiving or if it negatively impacts the parent/child relationship and the responsibilities that flow from that relationship in a significant way.”



# ACCOMMODATION: TRANSGENDER EMPLOYEES

## ***GENDER IDENTITY AND GENDER EXPRESSION***

“**Gender identity** is each person’s **internal and individual experience of gender**. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person’s sexual orientation.”

“**Gender expression** is **how a person publicly presents their gender**. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person’s chosen name and pronoun are also common ways of expressing gender.”

“**Trans or transgender** is an umbrella term referring to **people with diverse gender identities and expressions that differ from stereotypical gender norms**. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer.”

# ACCOMMODATION: TRANSGENDER EMPLOYEES

## ***GENDER IDENTITY AND GENDER EXPRESSION***

### **Washrooms**

“The Code allows for restriction of services or facilities to persons of the same sex for reason of “public decency.” Facilities such as washrooms, change rooms and locker rooms are typically segregated based on sex. **Trans people have the right to access these facilities based on their lived gender identity.**”

### **Dress Codes**

“Dress code policies need to be inclusive of everyone, including trans people. **Organizations must allow trans people and other gender non-conforming individuals to dress according to their expressed gender.** Dress codes must also accommodate women who have a masculine gender expression and men who have a feminine gender expression. Others may identify as gender non-conforming, and should not be required to dress in clothing either stereotypical of men, such as a tie, or women, such as a skirt. Dress codes that are gender-inclusive and flexible are the best approach.”

# WRONGFUL DISMISSAL & TERMINATION CLAUSES

## ***WOOD V. FRED DEELEY IMPORTS LTD., 2017 ONCA 158***

**Employment Agreement found to have invalid termination clause -  
Employee awarded 9 months' notice, instead of statutory notice under  
the *Employment Standards Act, 2000*.**

**“That the enforceability of the termination clause depends only on the wording of the clause itself, and not on what the employer may have done on termination.”**

# TERMINATION FOR CAUSE

## ***MCKINLEY V. BC TEL, 2001 SCC 38***

**Supreme Court of Canada determines contextual approach must be taken.**

“In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an ***assessment of the context of the alleged misconduct***. More specifically, **the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship.**”

“Underlying the approach...is the **principle of *proportionality***. An effective balance must be struck between the severity of an employee’s misconduct and the sanction imposed.”

# CONSTRUCTIVE DISMISSAL

***FARBER V. ROYAL TRUST CO., [1997] 1 S.C.R. 846***

**Fundamental change to employee's contract of employment violates contract.**

“...it has been established in a number of Canadian common law decisions that **where an employer *unilaterally* makes a *fundamental* or substantial change to an employee's contract of employment...the employer is committing a *fundamental breach* of the contract that results in its termination and entitles the employee to consider himself or herself *constructively dismissed*.** The employee can then claim damages from the employer in lieu of reasonable notice.”

# POACHING CUSTOMERS

## ***DONALDSON TRAVEL INC. V. MURPHY, 2016 ONCA 649***

**Accurate drafting of Non-Solicitation clauses - key to enforceability.**

**“a non-solicitation clause merely prohibits the departing employee from soliciting their business.”**

**“a non-competition clause restrains the departing employee from conducting business with former clients and customers”**

**“Accepting business” in the restrictive covenant in this case is equivalent to “conducting business”**

**“as the restrictive covenant in this case purports to proscribe not simply solicitation of [...] corporate accounts and customers but also the acceptance of business from such customers, it constitutes a non-competition covenant rather than a non-solicitation covenant.”**

# WRONGFUL COMPETITION

***H.L. STAEBLER COMPANY LIMITED V. ALLAN, 2008 ONCA 576***

**Restrictive Covenants are only enforceable if they are reasonable between the parties.**

**“a non-solicitation clause is normally sufficient to protect an employer's proprietary interest and that a non-competition clause is warranted only in exceptional circumstances.”**

**“The non-competition clause is a more drastic weapon in an employer's arsenal. Its focus is much broader than an attempt to protect the employer's [...] client or customer base; it extends to an attempt to keep the former employee out of the business. Usually, non-competition clauses are limited in terms of space and time.”**

# BREACHING CONFIDENTIALITY

***2158124 ONTARIO INC. V PITTON, 2017 ONSC 411***

**Injunction granted preventing employee from releasing and using confidential information Employment Agreement included Confidentiality clause.**

“from the availability or use of any confidential or private information for competitive advantage and pricing, loss of market share, impairment to goodwill or to solicit new clients...goes beyond lost sales commissions... **the probability of irreparable harm from the improper use of confidential or private information is established.**”



# EMPLOYMENT AGREEMENTS – The Solution?!

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## **MUST CONTAIN THE FOLLOWING CLAUSES:**

- **TERMINATION**
- **NON-SOLICITATION**
- **NON-COMPETITION**
- **CONFIDENTIALITY**



# QUESTIONS & ANSWERS

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**THE END – THANK YOU!**

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