



e2r Alert!

REPRISAL REVISITED

For all Canadian employers, it is crucial to understand the issue of reprisal through various statutory lenses. Today, a brief overview on reprisal in the context of occupational health and safety ("OHS") legislation, and the remedies that may awarded.

To begin, what is reprisal? A reprisal occurs when an employer punishes or threatens to punish an employee for asserting their statutory rights. Reprisal can take many forms, including but not limited to: terminating, or threatening to terminate an employee; suspending or threatening to suspend an employee; significantly reducing an employee's hours of work or wages; making substantial changes to an employee's job description; purposely passing up an employee for a promotion or raise; and creating a hostile or "toxic" work environment, such as verbally abusing an employee. Employees who believe they have been subject to reprisal may file a complaint with the relevant labour relations board.

So, when, and how, does a termination become a reprisal? To paraphrase several key decisions, in order for a reprisal under OHS legislation to be found, the adjudicator must be satisfied that:

1. the employee was exercising their statutory rights under the relevant OHS legislation;
2. the exercise of those rights was a motivating factor, no matter how small, in the employer's decision to terminate the employee's employment; and,
3. there is some basis for drawing a reasonable inference of a 'nexus' between the employee's actions and the alleged reprisal.

Employers should note where OHS reprisal provisions create a 'reverse onus' on the employer - meaning it is assumed the employer has contravened a section of the OHS legislation unless proven to the board, on a balance of probabilities, that they did not impose an unlawful reprisal on the worker. Crucially, however, bald allegations of reprisal will not be sufficient to establish a case for reprisal under OHS legislation absent the presence of a nexus, or connection, between the employee seeking to comply with or enforce the law, and their termination.

How will a reprisal be remedied? If a board finds that an employer is found guilty of workplace reprisal, it can order a wide range of remedies including reinstatement,

payment of lost wages, removing warning letters from the worker's file, and payment of any other financial losses the worker may have suffered from the employer's alleged misconduct. They can also face penalties, ranging from \$1,000 to \$50,000 per conviction or 12-month imprisonment. Corporations may face much steeper fines, ranging from a maximum of \$100,000 for the first conviction, \$250,000 for the second conviction, to \$500,000 for the third conviction. Lastly, reprisal may attract aggravated damages in a wrongful dismissal action due to the manner in which the employee was dismissed.

Employers should carefully consider disciplinary actions taken towards employees and whether those actions are in connection with any conduct and/or complaints made by the employee in relation to their employee rights. If the disciplinary actions are retaliatory in nature, they could constitute a reprisal, and the employee could be justified in seeking damages.

If you have any questions about these decisions or your agreements, please do not hesitate to contact ClientCare.