

# HR Compliance

Your Plain Language Guide to  
Hiring, Firing, Human Rights, Benefits & Privacy

# INSIDER

Volume 7 Issue 12

## DISCIPLINE

### The “Reprisal” Dilemma & 4 Ways to Solve It

THIS STORY WILL HELP YOU

Discipline employees who raise safety concerns without committing “reprisals”

**R**reprisal laws make it illegal to discipline, demote, fire or do other nasty things to employees because they exercise rights like raising safety concerns under OHS laws. That’s a good rule. The problem is that an employee who engages in a protected activity may *deserve* discipline for infractions *unrelated* to that activity. Thus, the employee who shows up for work drunk on Tuesday and verbally abuses her supervisor on Wednesday shouldn’t be immune from discipline simply because she made a safety complaint to the government on Monday. Recent laws strengthening reprisal protections, like the OHS reform (Bill 160) in Ontario and whistleblower protections for public servants in Saskatchewan, have added a new urgency to the issue. Here’s a look at the reprisal dilemma and how to resolve it.

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## BENEFITS & PAYROLL

### Cost Cutting: How to Get EI Premium Discounts

THIS STORY WILL HELP YOU

Save money on EI premiums and enhance STD benefits at government expense

**L**ooking to save your organization some money? If, like most employers, you offer short term disability (STD) coverage, you may qualify for a discount on EI premiums. Here’s a look at the opportunity and how to take advantage of it.





#### How to Qualify for EI Premium Discounts

The EI premium discount is available to organizations that offer STD benefits in the form of a cumulative sick leave plan or salary continuance program (whether self-insured or insured). To qualify for a reduction, the plan must:

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The Duty to Keep Your Workplace “Psychologically Safe”

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### DISCIPLINE WITHOUT REPRISALS CONTINUED FROM FRONT

## WHAT DOES THE LAW REQUIRE?

Reprisals are banned by at least 3 sets of laws:

**OHS Laws:** The occupational health and safety law of each jurisdiction include reprisal protections for employees who report health and safety concerns or exercise other rights under the OHS laws, e.g., being a member of the company's joint health and safety committee. A key part of Bill 160 in Ontario is the one making it easier for employees to file OHS reprisal complaints. (See the box on page 3 for more on reprisals in Bill 160.)

**Other Provincial Laws:** Bans on reprisals (sometimes referred to as "discriminatory actions" by an employer) are also included in other provincial/territorial/federal "regulatory" laws, such as employment standards acts, labour codes and environmental laws.

**Criminal Law:** Section 425.1 of the Canadian *Criminal Code* makes it a crime for employers to take or threaten adverse action against an employee for whistleblowing, which is defined broadly to include things like complaining about work hazards to provincial OHS authorities or wage violations to ESA officials.

## How Employers Can Be Guilty of Reprisal

There are 4 things an employee must show to prove a reprisal claim:

1. The employee engaged in protected activity;
2. The employer knew about the activity;
3. The employer took adverse action against the employee; **and**
4. The adverse action was taken *because* the employee engaged in the activity.

Although you can defend yourself against a charge by disproving any of these elements, it's element 4 where most reprisal cases are won or lost. Examples:

**Employer Loses:** A lead hand raises concerns to his supervisor about the safety of a training procedure. A heated argument ensues. The next day, the company takes away the lead hand's meal ticket; 3 days later, it moves his office to a less desirable location. The fact that the adverse actions came down within 4 days of the incident established an "arguable case" for a causal connection, says the Labour Board [(Re:) *Ivaco Rolling Mills*, [2002] O.L.R.D. No. 740].

**Employer Wins:** A BC court rules that the captain of a ferry that sank was fired for refusing to cooperate with the employer's accident investigation, not in reprisal for raising safety issues during the inquiry. None of the safety issues the captain raised during the investigation had anything to do with the actual sinking or contributed to a determination of its cause, the court notes [*Henthorne v. BC Ferry Services Inc.*, [2011] BCSC 409 (CanLII), April 1, 2011].

Reprisal doesn't have to be your only motive for disciplining (or taking other adverse action) against an employee; it need only be *one of* the factors. *Bottom Line:* Breaking the causal connection between the discipline and the protected activity, i.e., showing that the former had nothing to do with the latter, is the key to avoiding liability.

## 4 WAYS TO AVOID LIABILITY

There are 4 things you can do to minimize reprisal risk in imposing disciplinary action:

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## ONTARIO & REPRISALS IN BILL 160

The headline news about Bill 160, the Ontario OHS reform law, is its makeover of the province's OHS system. But the aspect of Bill 160 with the most immediate impact on you are the changes that make it easier for employees to file reprisal complaints.

**Previous Law:** Sec. 50(2) of the Ontario *Occupational Health and Safety Act* gave (and still gives) employees who feel they're the victim of reprisal by their employer the right to file a reprisal claim with the Ontario Labour Relations Board.

**Bill 160:** It takes guts for an employee to actually file reprisal claims. Bill 160 takes the heat off employees by allowing an MOL inspector to bring a reprisal claim on the employee's behalf. The employee still has to consent to the filing. And the inspector can't go to the Board if the dispute is or will go to arbitration. Still, letting MOL inspectors refer reprisal claims to the Board is likely to lead to more claims. What makes this even more alarming is the fact that in a Board proceeding, the burden is on the employer to prove that it *did not* commit reprisals.

### Strategy 1: Establish a Non-Retaliation Policy

First, create a clearly worded non-retaliation policy. The Model Policy below focuses on health and safety but can be adapted for any situation

**Caveat:** A non-retaliation policy, no matter how eloquently worded, won't do much good if nobody believes it. You should also recognize that employee reluctance to report safety concerns is especially great in economic down times where jobs are scarce. So, issue periodic reminders and take other steps to bolster and reinforce your policy.

### Strategy 2: Be Prepared for Reprisal Claims

Although a non-retaliation policy should help prevent them, you need to be ready in case reprisal complaints do arise. The first step in response is to investigate and determine if the complaint has merit. The Model Questionnaire on page 4 will help you organize your investigation and determine your vulnerability.

### Strategy 3: Use Progressive Discipline


Using progressive discipline goes a long way in managing reprisal risks and making punishments stick in court or arbitration; better yet, it helps you straighten out wayward employees and avoid disputes in the first place. Employees must be aware of and agree to progressive discipline in advance. So you need to set out your disciplinary rules and procedures in the collective agreement or employment manual if employees aren't unionized.

### Strategy 4: Document Disciplinary Actions

Recognize that any time you discipline an employee who's on record as complaining about safety or engaging in other form of protected activity, you run an excellent chance of facing a reprisal claim. A progressive discipline policy sets you up to beat such legal challenges. But policies


aren't enough. You also need to keep detailed records like memos to files, written notices, notes summarizing conversations, etc., documenting your decisions. The paper trail must be laid at the time of action before complaints are raised; it's extremely difficult to go back and create a record after the fact, lawyers warn.

### Conclusion

Don't back off from disciplining employees who commit offences just because they've engaged in an activity protected by the reprisal laws. The answer to the reprisal dilemma is not to avoid discipline but to ensure that it's carried out appropriately and for legitimate reasons not related to the protected activity. 

## NON-RETALIATION POLICY

Employees are reminded that [*company name*] is committed to ensuring your health and safety and obeying all OHS laws. Making you feel free to come forward and report hazards is an important part of our commitment. We have thus adopted the following policy to reassure you that you won't be fired, demoted, reassigned, disciplined or subject to any other punishment for reporting safety and health hazards or engaging in any other safety-related activities.

1. **Obligation to Report.** Reporting hazards and violations of OHS laws and company safety policy is something you not only can but must do.
2. **Open-Door Policy.** All supervisors and managers are required to keep an open-door policy that fosters trust and encourages employees to report their concerns. Supervisors and managers must take all reports seriously and refer the matter to the Joint Health and Safety Committee (JHSC) or health and safety representative or investigate it themselves.
3. **Non-Retaliation.** To repeat, [*company name*] will not retaliate in any way against any employee because he or she:
  - a. Acts or has acted in compliance with the [*province*] OHS Act or regulations
  - b. Helps or has helped in any JHSC activities
  - c. Seeks or has sought the creation of a JHSC or designation of a health and safety representative
  - d. Serves or has served as a JHSC member or health and safety representative
  - e. Seeks or has sought enforcement of the [*province*] OHS Act or regulations
  - f. Refuses or has refused dangerous work in accordance with the [*province*] OHS Act
  - g. Has testified or is about to testify in any proceeding under [*province*] OHS Act or regulations
  - h. Gives or has given information to the JHSC, health and safety representative or other person at this workplace who's responsible for complying with [*province*] OHS Act and regulations
  - i. Gives or has given information to an enforcement official or agency
4. **Violators Subject to Discipline.** Any person who doesn't follow this non-retaliation policy is subject to discipline, up to and including immediate termination. 

## QUESTIONNAIRE FOR RESPONDING TO REPRISAL COMPLAINTS

### PART A: VALIDITY OF CASE

**DOES EMPLOYEE HAVE A VALID CASE?**  YES  NO

**Explanation:** A reprisal complaint must make all 4 of these allegations to raise a legally valid claim:

**1. Employee Engaged in Protected Activity**  YES  NO

Does the employee claim that he/she engaged in any of the following activities:

- a. Reporting wrongdoing by the company to public officials  YES  NO
- b. Reporting wrongdoing by the company internally to a person or body within the organization  YES  NO
- c. Participating in an investigation or proceeding involving alleged wrongdoing by the company  YES  NO
- d. Requesting or taking leave or other to which the employee is lawfully entitled  YES  NO
- e. Asserting any other workplace right such as carrying out activities as a member of a union or participating in the company's joint health and safety committee  YES  NO

**Instructions:** If you list **NO** in boxes a – e above, the employee didn't engage in protected activity and doesn't have a valid claim for reprisal.

**2. Company Knew of the Protected Activity**  YES  NO

If you checked "YES" in a – e above, indicate if the employee alleged that a company officer, employee, contractor, subcontractor or agent knew of his/her engaging in protected activity:

**Instructions:** If the employee doesn't allege that the company knew of the protected activity, the company can't be liable for a reprisal.

**3. Company Took Adverse Action**  YES  NO

Check each of the following activities the employee claims the company took or threatened to take:

- Discharge  Demotion  Suspension  Other Forms of Discipline  Reassignment  Harassment
- Discrimination in Any Form in Regard to Compensation, Terms, Conditions or Privileges of Employment

**Instructions:** If you don't check off at least one of the listed items, the employee doesn't have a valid case.


**4. The Adverse Action Was Retaliatory**  YES  NO

Is the employee claiming the adverse action was a reprisal for engaging in protected activity?  YES  NO

**Instructions:** If you check NO, the employee doesn't have a valid claim; If you check YES, proceed to Part B

### PART B. COMPANY'S DEFENCE

**DOES THE COMPANY HAVE A VALID DEFENCE?**  YES  NO

- a. Does company have evidence that it would have taken the action described in Part A, Question 3 above, even if the employee had never engaged in the alleged protected activity?  YES  NO
- b. If the answer to (a) is **YES**, file with your response all of the following documents that apply:
  - Written statement explaining why company would have taken same action anyway
  - All affidavits supporting the company's claim
  - All other documents supporting the company's claim, such as written policies, warnings, performance evaluations, and other documents from the employee's personnel file
- c. If the answer to (a) is **YES**, consider including in your response a request for a meeting with the employee, the union or regulatory officials to present the company's position. 






## HR MONTH IN REVIEW

*A roundup of important new legislation, regulations, government announcements, court cases and arbitration rulings.*

### CASE OF THE MONTH

#### Ontario Case Tackles Mental Condition as Excuse for Employee Misconduct

Employees fired for misconduct can try 3 basic arguments to save their job:

-  I didn't do it;
-  I did it but I had an excuse or justification; and/or
-  I did it, it was unjustifiable but I didn't do it of my own free will.




The third defence—HR's version of the insanity defence—is relatively rare and hard to prove. But it does get raised from time to time, typically by employees who blame their transgressions on an uncontrollable mental illness or condition. A recent Ontario ruling shows how judges and arbitrators across Canada evaluate the defence.


#### THE CASE

**What Happened:** A long-term care facility fired a part-time maintenance employee for sex harassment, citing a laundry list of inappropriate behaviour with female co-workers. The union denied some allegations, tried to explain away others and argued that even if he *had* done all those nasty things, the employee didn't deserve to get fired because his behaviour was caused by brain damage suffered in a car accident 7 years before.

**What the Arbitrator Decided:** The Ontario arbitrator found just cause to fire the employee for sex harassment.

**How the Arbitrator Justified Its Decision:** The arbitrator cited 4 things an employee must prove to use the mental-condition-made-me-do-it defence:

-  He suffered from a mental illness/condition/situation affecting his behaviour;
-  The mental illness/condition/situation *caused* the misbehaviour;
-  The link between the illness/condition/situation and misbehaviour was strong enough to take away the employee's free will—essentially forcing the employee to behave the way he did; and

 The employee has since gotten the rehab necessary to control the problem and return to work without further incidents.


The union's 2 medical experts, a neuropsychologist and speech pathologist, testified that brain damage from the car accident caused the employee to act the way he did with co-workers by removing his social "filter," but the employer's neuropsychologist witness disagreed. And it was the latter witness whom the arbitrator chose to believe, given her experience, in ruling that the employee did have control over his behaviour and couldn't use brain damage to avoid discipline.

*Regional Municipality of Durham and CUPE, Local 132, 2011 CanLII 55999 (ON LA), Sept. 2, 2011*

#### ANALYSIS

It's dangerous to ascribe too much importance to a single case ruling, especially one decided by an arbitrator rather than a judge. But the arbitrator in *Durham* didn't freelance; he stayed rooted in precedents from other cases—not just from Ontario but many jurisdictions. In fact, the 4 criteria cited for an employee to use a mental illness or condition as an excuse for misbehavior come from a 1999 federal case called *Re Canada Safeway Ltd. and Retail, Wholesale & Dept. Store Union* ((1999) 82 L.A.C. (4th) 1) and remain the standard across Canada.

The second important thing to recognize is that these 4 criteria apply not just to brain damage but to other mental conditions or situations affecting an employee's behaviour. Thus, the analysis in *Durham* is relevant to cases where employees blame misbehavior on drug addiction and even heightened stress resulting from a personal crisis like a divorce or death in the family.

The third thing to understand is that assessment of how illnesses and conditions affecting behaviour is ultimately the medical experts' responsibility. The job of the HR director is to get the case to the experts, i.e., to manage the disciplinary process and avoid the administrative errors that will make any termination wrongful regardless of the employee's mental condition. 



#### LAWS & ANNOUNCEMENTS

##### Demographics

Sept. 29: Population dipped by 703 last year and now stands at 510,578. The province's median age, 44, is highest in Canada and 4 years above the national median age of 40.

#### CASES

##### Raising Attendance Concerns ≠ Reprisal for Safety Complaint

A temporary OHS coordinator claimed that a letter from his employer reminding him to work regular hours was a reprisal for calling the government to report alleged safety violations in the workplace. The Labour Relations Board disagreed. The company had spoken to the coordinator about his attendance problems well before he had raised his safety concerns [*Re: Miller*, [2011] N.L.L.R.B.D. No. 4, Aug. 24, 2011].



#### LAWS & ANNOUNCEMENTS

##### Public Pensions

Sept. 15: The government kicked off review of public sector pension plans. Key issues on the table include keeping benefits competitive with what private sector employers provide, long-term financial viability of DB plans and allocation of risk between employees and employers.

#### CASES

##### Injuries in Employer Vehicle Covered by Workers' Comp

Workers' comp approved the claims of 7 employees who were injured commuting to work in a vehicle provided by their employer. The employer appealed but to no avail. The fact that the employer provided the vehicle to convey them to the remote job site put the vehicle in the employer's "care and control," and thus essentially part of the employer's premises [*VSL Canada LTD v. WHSCC*, [2011] NBCA 76 (CanLII), Sept. 8, 2011].

**LAWS & ANNOUNCEMENTS****Privacy**

Sept. 29: A re-introduced bill would extend PIPEDA privacy protection to personal information collected, used and disclosed in commercial transactions. Among other things, Bill C-12 addresses when consent is required and when it can be dispensed with and requires organizations to notify individuals of privacy breaches.

**Mandatory Retirement**

Oct. 4: The federal government has finally caught up with the rest of the country on mandatory retirement. The new budget bill includes a provision that would do away with mandatory retirement at 65 (or other pre-designated age). Under current human rights laws, federally regulated employees can be forced to retire at the "normal" retirement age for the position.

**Pensions—Coverage**

Sept. 20: As of 2009, 6 million employees are covered by a Registered Pension Plan provided by their employer, an increase of 700,000 since 1999. Of these 6 million, 3.0 million are female, as compared to 2 million back in 1989. The bad news is that the percentage of the workforce with pension coverage has declined from 34% to 33% in the same period.

**Pensions—Surpluses**

Sept. 22: OSFI issued a new instruction guide explaining what employers must do to get the Superintendent's consent to a refund of an actuarial surplus in a DB either under the plan documents or via an employer established claim established with the consent of 2/3 of each beneficiary category.

**CASES****Service Canada Tries to Block Strike by Benefits Officers**

Service Canada invoked a public service labour law allowing the government to curb strike rights of essential public servants to prevent a strike by Citizen Service Officers (CSOs) who help members of the public claim EI, CPP and OAS/GIS benefits. The Public Service Relations Board ruled that it had jurisdiction, i.e., legal authority, to decide if Service Canada could block the strike and the Court of Appeal upheld the decision as reasonable [*Canada (Attorney General) v. Public Service Alliance of Canada*, [2011] F.C.J. No. 1325, Sept. 19, 2011].

**Company Can Keep Using Single Safety Committee for 9 Sites**

A company with an "umbrella" Joint Health Safety Committee for 9 locations within one "territory" was ordered to establish separate JHSCs for each location. But on appeal, the federal OHS Tribunal revoked the ruling. The company had been using the single JHSC/territory approach for over 10 years without objection from OHS officials or the union. And a recent audit concluded that the umbrella JHSC was working well [*Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [2011] OHSTC 21, Aug. 22, 2011].

**LAWS & ANNOUNCEMENTS****Temporary Foreign Workers**

Sept.: Highlights of the government's report on the state of the province's TFW program:

- ★ TFW isn't a permanent solution to the skilled labour shortage
- ★ The real problem is skill shortage in permanent positions
- ★ The government should continue to protect TFWs but focus on a broader solution to keep skilled workers in the workforce for the long-term.

**Work Safety**

Sept. 2: It's officially okay for employers to drive injured or ill employees to a hospital in the rear compartment of a company mobile treatment centre (MTC) vehicle. This clarification was needed because, technically, transporting "passengers" in the rear of an MTC vehicle violates the *Traffic Safety Act*.

**Mental Health**

Sept. 12: The government unveiled a 5-year plan to improve the province's addiction and mental health system. Elements:

- ★ More emphasis on prevention and health promotion
- ★ Tackle mental health proactively across a continuum of services starting with youth
- ★ Ease provider coordination of mental health and addiction care services.

**CASES****Union Petitions Listing Company Name Wrong Count for Certification**

Although a union got enough employee signatures for certification, the Board refused to count petitions inaccurately stating the company's name as United Protection Services INC. instead of United Protection Services INC/United First Nation Corp. It's okay for the Board to insist that petitions list the right company name. But, the arbitrator added, the error was "bona fide" and the employees knew who they worked for. So the Board had to count all the petitions—even the ones listing the wrong name [*United First Nation Alberta Corp. (Re)*, [2011] A.L.R.B.D. No. 60, Sept. 7, 2011].

**Shop Steward Fired for Fighting with Supervisor**

A shop steward who pushed and deliberately turned a hose of scalding hot water on his supervisor was fired for violating company policy against fighting. The union claimed the steward technically wasn't "fighting." But the arbitrator was less than impressed. The steward's conduct was worthy of termination, noted the arbitrator, regardless of whether it deserved the label "fighting" [*XL Foods Inc. (Lakeside Packers Operation) v. United Food and Commercial Workers Canada, Local 401 (Keita Grievance)*, [2011] A.G.A.A. No. 39, Aug. 19, 2011].

**LAWS & ANNOUNCEMENTS****Minimum Wage**

Oct. 1: Reminder: The minimum Manitoba wage increased 50¢, from \$9.50 per hour to \$10.00.

**CASES****Court Tosses Discrimination Claim after Employee Rejects Settlement Offer**

Manitoba law gives the Human Rights Commission power to dismiss a claim if the person who asserts it turns down a "reasonable" settlement offer. A mechanic suing his employer for disability discrimination said the Commission had abused this authority by dismissing his case. The court acknowledged that the Commission had tweaked the employer's settlement offer—instead of a general release, it said the mechanic had to release just his discrimination claim against the company—but found the ruling reasonable and upheld dismissal of the discrimination claim [*Korsch v. Manitoba (Human Rights Commission)*, [2011] M.J. No. 304, Sept. 14, 2011].

**CASES cont'd.****Employee Entitled to Moving Expenses When He Retires**

A claims agent in New Brunswick was tempted to accept his supervisor's 1984 offer to relocate to Regina. But he had never been west of Toronto and wasn't sure he'd like Saskatchewan. If it doesn't work out, you can move back at company expense, his supervisor reassured him; and if you become an officer, we'll pay for you to move back when you retire. At least that's what the agent claimed the supervisor said. The court found his story credible and ordered the company to honour the promise and pay the moving expenses the agent incurred when he moved back to New Brunswick after retiring in 2009 [*Andronikos v. Canadian Pacific Railway Co.*, 2011 MBQB 198, Aug. 12, 2011].

**LAWS & ANNOUNCEMENTS****Work Safety**

Sept.: The Workers' Comp Board issued an application form employers can use to seek a variance from OHS requirements, i.e., official permission to replace a safety measure mandated by the regulations for an alternative that provides equal or greater protection to workers. To get the variance, employers must provide:

- ★ A hazard assessment of the proposed alternative and how it compares to the required process
- ★ An outline of other alternative control measures
- ★ A training and supervision plan for the proposed alternative.



## BRITISH COLUMBIA

## LAWS &amp; ANNOUNCEMENTS

**Minimum Wage**

Nov. 1: Reminder: Today is the day that the BC general minimum wage went up from \$8.75 to \$9.50 per hour, and to \$8.75 for employees who serve liquor.

**Jobs**

Sept. 22: Key elements of the government's new jobs plan:

- ✦ Invest in infrastructure development projects
- ✦ Promote exports of BC goods and services, especially in Asia
- ✦ Cut red tape and offer business incentives to create jobs
- ✦ Foster new business development in Aboriginal communities.

**Public Health**

Sept. 7: For the 12th year in a row, BC had the lowest smoking rate of any province—14.3% in 2010, as compared to 14.9% in 2009. Ontario is next lowest at 15%. The national average is 17%. The province with the highest smoking rate? Saskatchewan at 21%.

**Work Safety**

Oct. 26: That's when public comments closed on proposed changes to the OHS Regulations. Key changes on the table:

- ✦ Annual engineer re-certification of fall protection equipment
- ✦ Riving knife acceptable device to prevent table saw kickback
- ✦ Compressed gas pressure limits for non-registered pressure vessels
- ✦ Dielectric testing of elevated work platforms
- ✦ Use of work platforms supported by lift trucks
- ✦ Passing bucket of insulated aerial working devices between energized high voltage conductors.

## CASES

**City Tries to Accommodate Firefighter with Post Traumatic Stress**

After more than 3 years of medical leave, a city finally terminated a firefighter with Post Traumatic Stress Disorder. The Human Rights Tribunal ruled that the firefighter had no reasonable prospect of proving her disability discrimination complaint and dismissed the case. The city had tried to accommodate her—keeping her on paid sick leave for a year and a half and unpaid sick leave for 2 years more. But accommodation doesn't require employers to keep a position open indefinitely [*Rush v. Richmond (City)*, [2011] B.C.R.H.T.D. No. 244, Sept. 7, 2011].

**Fired Paralegal Didn't Mitigate Damages**

A law firm fired a paralegal earning \$6,000 per month without cause after 16 months of service with 2 weeks' pay in lieu of notice, plus vacation. The paralegal demanded 6 months + enhanced vacation, noting that he was forced to relocate to Mexico and open a restaurant after failing to find work as a paralegal. The court said the paralegal hadn't done enough to mitigate damages because he looked only for positions in the same narrow legal practice—workers' comp. So it cut damages to 4 months' notice and 4% vacation—\$22,123 [*Pelletier v. Gosal*, [2011] B.C.J. No. 1722, Sept. 7, 2011].

**Disclosing False Personal Information to Employer Is Privacy Violation**

A youth centre fired a childcare worker after the Ministry for Children and Family Development (MCFD) disclosed that he had been the subject of a complaint 10 years earlier. The worker had signed a consent allowing the MCFD to disclose his file but claimed the complaint was totally unsubstantiated. The Court acknowledged MCFD's interest in protecting children but said it violated its duty under the *Freedom of Information and Protection of Privacy Act* to make "every reasonable effort to ensure that personal information is accurate and complete" before releasing it [*Harrison v. BC (Information & Privacy Commissioner)*, 2011 BCSC 1204 (CanLII), Sept. 6, 2011].

**Company Denied Access to Employees' Personal Driving Records for Safety**

The union challenged a new policy requiring employees who drive company vehicles to give the company access to their BC motor vehicle records. The company claimed the policy was necessary for safety but couldn't show that it had a problem with vehicle incidents. So, the arbitrator ruled that requiring employees to provide personal information was a privacy violation [*Spectral Energy v. Canadian Pipeline Employees' Assoc.*, [2011] CanLII 52175 (BC LA), Aug. 12, 2011].

**PTSD Isn't Work-Related Under Workers' Comp**

An employee who claimed that she was humiliated by the way a project manager spoke to her over the radio in a client's presence left work and never returned. Workers' comp rejected her claim for post-traumatic stress disorder (PTSD), finding that her condition wasn't in response to a sudden and "unexpected" event. The appeals court upheld the ruling, noting that the employee had upset the manager by not following his instructions [*Downs Construction Ltd. v. BC (Workers' Compensation Appeals Tribunal)*, [2011] B.C.J. No. 1583, Aug. 18, 2011].



## QUÉBEC

## LAWS &amp; ANNOUNCEMENTS

**Government Reform**

Sept. 29: Government agencies are applying regulations too strictly at the expense of fairness, waiting periods for government action are too long and quality control is inadequate. Such are the findings of the Québec Ombudsman in its annual report reviewing the state of government services in the province.

**Pensions**

Sept. 14: The Régie des rentes revised a pair of pension forms:

- ✦ Application for Registration of an Amendment to a Pension Plan form
- ✦ RCR-129 form required to request an exemption from the provisions of the *Supplemental Pension Plans Act*.

## CASES

**Workers' Comp Covers Injury Suffered on Way Home from Work**

A plant employee got into a traffic accident on a road belonging to his employer while driving home after work. The *Commission des lésions professionnelles* (CLP) ruled that his injuries were covered by workers' comp and the Superior Court agreed. An incident involving a worker traveling to or from work is work-related as long as it occurs in a reasonable time within the shift and isn't interrupted by a strictly personal activity, the CLP explained [*MPI Moulin à Papier de Portneuf Inc. v. Commission des lésions professionnelles*, [2011] QCCS 3439 (CanLII), Sept. 7, 2011].



## NOVA SCOTIA

## LAWS &amp; ANNOUNCEMENTS

**Minimum Wage**

Oct. 1: The minimum wage increased from \$9.65 to \$10 per hour. The minimum wage for workers with less than 3 months' experience in the work for which they're hired went up to \$9.50.

**Workers' Compensation**

Sept. 1: The 2012 average premium rate will remain \$2.65 per \$100 of assessable payroll for the eighth year in a row. 63% of employers will pay higher rates. Industries with lower rates include fish processing, construction infrastructure, electrical work, hospitals and nursing homes. 96 employers with high claims costs will pay surcharges, as compared to 92 in 2011.

**Immigration**

Sept. 28: The government settled a class action lawsuit by immigrants who claim they didn't get the benefits promised for participating in the now defunct Economic Stream of the Nova Scotia Nominee Program. Under the settlement, individual members of the class that filed the lawsuit will get up to \$75,000 in refunds.

## CASES

**No Proof Mould at Work Caused Employee's Respiratory Illness**

Workers' comp rejected the claim of an employee for respiratory problems and a bladder infection she allegedly developed at work as a result of exposure to mould after a flood at the site. The Tribunal upheld the denial, ruling that there wasn't enough medical evidence to show that the illnesses were caused by mould in the workplace [*WCAT #2009-209-AD*, [2011] CanLII 50675 (NS WCAT), Aug. 19, 2011].



## PRINCE EDWARD ISL.

## LAWS &amp; ANNOUNCEMENTS

**Minimum Wage**

Oct. 1: An increase in the minimum wage from \$9.30 to \$9.60 per hour took effect. The next increase is scheduled for April 1, 2012, when the minimum wage hits \$10.

**Workers' Compensation**

Sept. 19: The Workers' Comp Board made changes to 2 policies:

- ✦ *Benefit Assignment (POL-55)*: WCB can reimburse social services agency on behalf of the worker for an overpayment of social assistance benefits
- ✦ *Weighing Of Evidence (POL-68)*: WCB will afford greater weight to objective medical evidence (as opposed to subjective evidence like medical opinions) in evaluating if claims are work-related.

## LAWS & ANNOUNCEMENTS

### Workers' Compensation

Sept.: Workers' comp rate increases will not cause companies to lay off employees and shut down, according to a new WSIB clarification. The average 2% premium increase announced last month "is the absolute minimum" necessary to responsibly tackle the current operating deficit, the WSIB insists. Of course, with the Arthurs Commission reform committee report due out shortly, premium increases may be just the beginning of the pinch felt by employers as a result of workers' comp austerity measures.

### Human Rights

Sept. 28: A visually impaired employee's guide dog causes a co-worker to have a severe allergic reaction; a devoutly Christian employee refuses to work with a homosexual colleague on religious grounds. These are just a couple of examples of how human rights protections can collide. The Human Rights Commission says it will publish a policy addressing this problem in 2012. We'll keep you apprised.

### Work Safety

Sept. 1: The Ministry of Labour appointed the first ever Chief Prevention Officer to oversee work safety in the province. The CPO position was created by Bill 160, the Ontario OHS reform law adopted in May. After an international job search, the MOL settled on a home grown CPO—George Gritzotios, founding executive director of the Construction Sector Council.

## CASES

### DB Plan Surplus Belongs to Members, Not Employer

In 1979, HBC acquired Simpsons and took over its DB plan. After a temporary close-down, HBC re-opened the plan in 1994, added a DC element and extended coverage to employees of 2 HBC subsidiaries. Between 1994 and 2006, HBC used plan surplus assets to make DC contributions on behalf of members of the 2 HBC subs. The Simpsons members (including retirees) cried foul and found a sympathetic ear in the court. The original plan documents established a trust in plan assets in favour of plan members. HBC wasn't a beneficiary of that trust; so all surplus assets belonged to members in the event of plan termination and wind up [*Sutherland v. Hudson's Bay Co.*, [2011] O.J. No. 4208, Sept. 22, 2011].

### Court Reluctantly Okays GM Health Care Cut Settlement

Under the government bailout, GM Canada and the union agreed that the company couldn't afford to pay health benefits to current or retired hourly employees. So after 18 months of negotiation, the sides agreed to establish an independent trust to pay the benefits—albeit at a much reduced rate. GM retirees objected. The court acknowledged that the retirees had been left out of the negotiations and the deal was rushed. But while the settlement was flawed, it was fair and much preferable to the alternative of liquidation and dissolution. So, "with sadness" for the plight of some retirees, it approved the settlement [*General Motors of Canada Ltd. v. Abrams*, [2011] O.J. No. 4175, Sept. 13, 2011].

### Temps Get Stat Holiday Pay

Two years ago, Ontario passed a law granting ESA benefits to temps. In one of the first rulings under the new law, the Ontario Labour Relations Board ordered a placement agency to pay holiday pay to 2 of its temps. Neither temp was assigned work for holiday—or the day before and after. However, the public holiday fell on a regular working day and both temps were available to work that day [*Handyman Personnel Industrial Division v. Sullivan*, File No. 70076050-0, Aug. 4, 2011].

### Alcoholic Electrician Fired for Being Drunk Gets Reinstated

Being drunk at work sounds like just cause for termination. But when the problem is related to alcoholism, the ban on disability discrimination kicks in. And so it came to pass that a hog slaughtering facility couldn't fire an alcoholic electrician after his third incident of drunkenness on the job. The employer didn't do enough to accommodate, said the arbitrator, and had to reinstate him—although the electrician had to submit to random alcohol/drug testing and participate in a treatment program [*Fearman's Pork Inc. v. United Food & Commercial Workers International Union, Local 175 (Kutlesa Grievance)*, [2011] O.L.A.A. No. 288, Aug. 16, 2011].

### Cocaine Addict Fired for Stealing from His Employer

A transit worker fired for stealing and selling company property blamed his transgressions on addiction to cocaine. Drug addiction is a disability, the arbitrator acknowledged. But premeditated theft strikes at the very foundation of the employment relationship. Moreover, the worker had money and couldn't prove that stealing from the company was necessary to support his addiction. So the firing was upheld [*Toronto Transit Comm. v. CUPE*, [2011] CanLII 49050 (ON L.A.), Aug. 6, 2011].

### Okay to Fire Employee for Threatening a Co-Worker

A city employee was turned away in her attempt to grieve termination for issuing a death threat to a co-worker. The employee had a history of violent, angry behaviour at work and had been repeatedly disciplined. And she uttered the latest threat only 2 days after completing anger management. She didn't accept responsibility, the arbitrator added, for her conduct or indicate how she'd ever get control over her "angry impulses" [*City of Kingston v. CUPE, Local 109*, [2011] CanLII 50313 (ON L.A.), Aug. 18, 2011].

## LAWS & ANNOUNCEMENTS

### Payroll Wages

Sept. 29: Weekly earnings averaged \$873.57 in July, fourth highest in Canada and 3.9% above July 2010 levels. Based on the 2.8% inflation rate, the increase represents a 1.1% increase in real wages. Alberta has Canada's highest weekly wages at \$1,022.57.

### Public Health

Sept. 29: The government hired law firms to sue tobacco companies to recover public health care costs. Other provinces, including BC, NB, ON, NL, AB, MB, NS and QC, have or are thinking about bringing similar lawsuits.

### Pensions—Funding

Sept. 15: The Financial Services Commission issued a policy bulletin explaining how DB plans can elect a 3-year moratorium on funding actuarial deficits. Highlights:

- ✦ No benefits improvements during relief period
- ✦ Payments for solvency deficiencies before election must be made
- ✦ Plan must disclose election to members within 60 days.

### Pensions—Transfer Deficiency

Sept. 15: Another new FSC policy bulletin clarifies requirements governing transfer deficiencies that must be made by DB plans with solvency ratios of less than 1:1, including transferring the commuted value of a benefit from the plan.

## CASES

### Labour Board Shouldn't Have Revoked Union's Certification

In 2007, a union was officially certified as bargaining agent for the employees of a food retailer in Regina. But after a change in ownership, tax reorganization and the opening of a new store, the company asked for a new vote. The Labour Board agreed and this time the union lost. The union appealed and the court said the new election order was unreasonable and reversed it. The ownership change, new store and tax reorganization weren't significant enough to justify revocation of the union's certification [*United Food & Commercial Workers, Local 1400 v. Saskatchewan Labour Relations Board*, [2011] S.J. No. 538, Sept. 7, 2011].

### Making Employees Disclose Illness for Sick Leave Violates Privacy

A union claimed that a casual sick leave form requiring employees to list their illness and authorizing the company to contact their doctor violated privacy. The telecom company claimed the form was necessary to prevent "fraudulent abuse" of sick leave by employees faking illnesses. But the arbitrator disagreed, ruling that some of the requested information wasn't "reasonably necessary" [*SaskTel v. Communications, Energy & Paperworkers Union of Canada*, [2011] CanLII 49533 (SK L.A.), Aug. 17, 2011].

## LAWS & ANNOUNCEMENTS






### Labour Market

Sept. 9: August employment stood at 73.0% in August, as compared to the national average of 63%. Month-to-month, the economy gained a net 300 jobs (+800 full-time and -500 part-time). Employment in the territories has grown by 1,100 since January.

## CASES

### Employee Wins \$39K in Unpaid Overtime

A senior flight paramedic earning \$100,000 per year sued his ex-employer for unpaid overtime. Under the ESA, overtime is payable at 1 ½ the employee's hourly rate or minimum wage if he has no hourly rate. Although the paramedic's contract deliberately didn't include an hourly rate, the employer listed the rate of \$52 per hour on his pay stubs. The arbitrator relied on that rate to determine that the paramedic was owed \$39,175 in overtime. The court said the ruling was reasonable and upheld it [*Medic North Emergency Services Ltd. v. Harnish*, [2011] N.W.T.J. No. 55, Sept. 20, 2011].





-  Provide at least 15 weeks of benefits;
-  Match or exceed the level of benefits provided under EI (maximum of \$468/week);
-  Pay benefits within 14 days of a disability;
-  Allow employees covered by the plan to claim benefits after an eligibility period of 3 months or less; and
-  Cover employees on a 24-hour-a-day basis.

To qualify for the EI premium discount, you must have a formal written plan document or policy (see page 10 for a Model Plan Document you can adapt.) You also have to share 5/12 of the savings with employees.

### How Much You Can Save

The first thing the HR director needs to understand is how the discount works. The 2011 EI premium rate is \$1.78 per \$100 of an employee's insurable earnings (\$1.41 in Québec) up to \$43,200, or an annual maximum of \$786.76. Employers must contribute 1.4 times the employee contribution, or \$1,101.46 (\$872.50 in Québec). Qualifying for the discount entitles you to calculate the EI premium contribution at a reduced rate, i.e., to use a multiplier below the standard 1.4 rate.

The multiplier discount and resulting EI premium savings vary depending on which category your STD plan falls into. There are 4 categories, each of which has its own premium discount rate and multiple based on the perceived likelihood of plan members to claim all or part of the 15 weeks of EI sick benefits available after a 2-week waiting period.




-  **Category 1:** A cumulative paid sick leave plan that allows for a minimum monthly accumulation of 1 day and a total maximum accumulation of at least 75 days;
-  **Category 2:** A cumulative paid sick leave plan that allows for a minimum monthly accumulation of 1 2/3 days and a total maximum accumulation of at least 125 days;
-  **Category 3:** A weekly indemnity plan (both insured and self-insured) with a maximum benefit of at least 15 weeks; and
-  **Category 4:** A weekly indemnity plan with a maximum benefit period of at least 52 weeks (currently, this reduction is available only to Quebec Treasury Board).

Here are the rates and multiples for each category:

Most plans fall into Category 3. The maximum annual EI premium discount for such plans is \$172.38 per employee. That might seem like a modest saving but it adds up fast. Thus, at 500 employees, you save over \$86,000 per year. You can also pro-rate the savings if you implement the STD plan for only part of the year.

### How to Reimburse Savings to Employees

As noted above, you must ensure that each employee to whom an EI discount applies benefits by at least 5/12 of the savings amount. In your application for the EI premium reduction, you must describe how those savings will be passed along to employees. Acceptable methods include:








-  Cash rebates directly to the employee;
-  New benefits financed by the savings such as dental or group life insurance; or
-  Enhancements or upgrades to existing benefits financed by the savings such as extra holidays, more time off work or even free coffee.

### Insider Says

In assessing your application for premium reduction, Service Canada will contact you to ensure you understand the 5/12 requirement and how to make the appropriate calculations.

### How to Apply for EI Premium Discounts

If you want to take advantage of the EI premium discount, you can apply by completing the HRSDC application, [Form NAS-5022, Application for Employment Insurance Premium Reduction](#), or putting in a written request to HRSDC using your company letterhead. Either way, make sure you include evidence of your organization's commitment to provide STD benefits to employees and details about the plan, which may include:

-  A union or association agreement;
-  An industry-wide trust contract;
-  A private carrier's insurance policy;
-  An administrative measure from your employees' handbook;
-  Minutes of a Board of Directors' meeting indicating that your employees are provided with an STD plan;
-  A statement contained in a personnel policy bulletin; or
-  Any commitment in writing to your employees.

2011 Annual EI Premium Reduction Rates Corresponding Multiples of Premium Rate of 1.78%								
Category 1		Category 2		Category 3		Category 4		
EI Savings (per \$100 insurable earnings)	Multiple	EI Savings (per \$100 insurable earnings)	Multiple	EI Savings (per \$100 insurable earnings)	Multiple	EI Savings (per \$100 insurable earnings)	Multiple	
Annual (12 months)	27¢	1.248	40¢	1.175	39¢	1.181	42¢	1.164
1 month	2¢	1.389	3¢	1.383	3¢	1.383	4¢	1.378

SOURCE: Service Canada

CONTINUED ON PAGE 10

**EI DISCOUNTS CONTINUED FROM FROM PAGE 9**

The application must also list your agreement to return 5/12 of the savings to employees and explain the method you intend to use to make good on that commitment, e.g., cash rebate, new or enhanced benefits.


If Service Canada determines that you don't qualify for EI discounts, it may ask you to modify your plan and reapply. You also have 1 year to appeal Service Canada's decision to the EI Commission. For more information, see, <http://www.servicecanada.gc.ca/eng/cs/prp/010.shtml>, or call Service Canada at 1-800-561-7923.

**How to Renew an Existing EI Premium Discount**

EI discounts are also renewable. Until 2010, employers had to fill out a renewal application confirming compliance with the 5/12 requirement every year. But now you can renew the discount without filling out the annual renewal form. However, you do have to submit a renewal application and

undergo reassessment, including compliance with 5/12, when you modify the STD plan.

**Conclusion**

We all know that cost cutting is an imperative. The best cost cutting measures are the ones where paying less doesn't mean getting less. That's why you owe it to your organization—and your career—to take a long hard look at EI premium discounts—especially if you're already providing STD benefits to your employees. Aside from the administrative costs of applying, the only money you spend for EI discounts is the 5/12 share of savings you return to employees. But that's house money; and because the money goes to enhancing benefits, the 5/12 share is actually an investment in recruiting and retention capacity. In essence, then, EI premium cuts are 2 for the price of 1: less out-of-pocket EI costs for the organization and a sweeter benefits package for your employees. 

**MODEL POLICY****ABC COMPANY SHORT TERM DISABILITY PLAN**

*(Highlighted language is required to qualify for EI premium discounts)*

**1. Eligibility**

- a. This policy applies to (unionized, non-union, full-time, part-time) staff.
- b. Employees who can't perform the normal duties of their position and who are under medical care following sickness or accident **[EMPLOYEES COVERED 24-HOURS/DAY]**, other than work related accident or occupational disease, are entitled to a sick leave indemnity in accordance with the following provisions. Work related accidents or occupational disease are covered by Workers Compensation.
- c. To be eligible for short-term disability benefits, **the employee must have completed a 3 month probationary period [ELIGIBILITY PERIOD OF 3 MONTHS OR LESS]** and **be absent for more than 2 consecutive working days. [PAYMENTS START WITHIN 14 DAYS OF DISABILITY]**.
- d. The employee must justify this absence with a medical certificate from a legally qualified medical practitioner stating that the employee is unable because of sickness or accident to perform the normal duties of their position plus the expected duration of the leave.

**2. Duration of Benefit**

The duration of any short-term disability leave must not exceed 6 months. A short-term disability leave which is interrupted but which is related to the same sickness must not exceed a cumulative period of 6 months within a period of 12 months. **[EXCEEDS 15 WEEKS]**

**3. Amount of Benefit**

- a. An employee on short-term disability leave receives an indemnity equal to one hundred percent (100%) of salary as of the date of onset of short-term disability, reduced by the following amounts: **[BENEFIT EXCEEDS 2011 EI MAXIMUM OF 55% OF \$44,200 OR A MAXIMUM OF \$486/WEEK]**

- i. All of the normal payroll deductions which must be made or would have been made had it not been for the disability leave.
  - ii. Any amount of income received by the employee in respect of their disability, including payments under the Quebec Pension Plan, the Canada Pension Plan, any Workers' Compensation Law, Motor Vehicle Insurance Law or Criminal Injuries Compensation Act or any other government compensation program.
- b. If an increase in salary takes place during the short-term disability leave, the employee benefits nonetheless from the increase to which the employee is entitled, as if the employee had not been on a short-term disability leave.


**4. Benefit Continuance**

- a. An employee will receive credit for service while on short-term disability leave for the purposes of vacation and employment security.
- b. All contributory and non-contributory benefits plans will be continued in respect of an employee on short-term disability leave.

**5. Company Medical Examination**

Company ABC reserves the right to require that an employee requesting a short-term disability leave, or any extension thereof, be examined by a legally qualified medical practitioner appointed by the company at the company's expense. The leave recommendation of Company ABC's medical practitioner shall prevail.

**6. Return to Work**

Upon his/her return to work, an employee will be reinstated into the position held at the start of the short-term disability leave. If the employee's position has been abolished, the employee will be accorded the rights and privileges that would have been granted had the employee been at work. 

## HIRING &amp; RECRUITING



## Spot the Employment Discrimination in the Job Application Form

## SITUATION

The box below contains excerpts come from the job application form posted by the law firm High, Ring, Day, Bockle, LLP (HRDB), on the Corporate Careers section of its website:

- A. Name: (circle one) Mr/Ms/Mrs \_\_\_\_\_
- B. Date of birth: \_\_\_\_\_
- C. Dependent(s) name(s): \_\_\_\_\_
- D. List names/addresses/dates attended of all schools attended: \_\_\_\_\_
- E. Please attach a recent photograph to this application

## QUESTION

**Which, if any, of the above items are likely to get HRDB into hot water under employment discrimination laws?**

## ANSWER

**All 5 items are discriminatory.**

## EXPLANATION

It's illegal to base hiring decisions on an applicant's race, religion, national origin, marital or family status, gender, age, disability and other protected characteristics. Job application or interview questions during the pre-hiring process that seek to obtain information about whether applicants have such characteristics are a form of employment discrimination the law forbids. All 5 of the items in the HRDB application form go over this line.

## WHY THE ITEM IS DISCRIMINATORY

**A is discriminatory** because Mr/Mrs/Ms reveals the applicant's gender and marital status. It's also illegal to have men and women complete a different application form for the same job.

**B is discriminatory** because it asks for age. **Exception:** Asking about age is okay to verify that applicants meet minimum age requirements specified by law to do a particular job.

**C is discriminatory** because you can't ask applicants about children or family status. Of course, payroll can and must obtain information about dependents—but only *after* the applicant is hired as an employee.

**D is discriminatory** but in a subtle way. According to several human rights commissions, asking for names, locations and dates of *all* schools may reveal an applicant's religious affiliations, national origin and/or race. Limiting the inquiry to technical, vocational and post-secondary schools limits but doesn't completely eliminate this risk. What you can do is ask applicants to list grade level completed, degrees obtained and courses taken.

**E is discriminatory** because photographs reveal race, gender and potentially other personal characteristics like age or religion that you're not allowed to ask about. 

# DRUGS & ALCOHOL

## WINNERS & LOSERS

### Liability for Traffic Accident Caused by Employees Who Drink at Work

Employees who drink alcohol at work create a liability risk for your organization. Of course, you probably have a policy that bans drinking on the job. But not all organizations are vigorous about enforcing their policy. Workplaces where drinking is condoned and even those where the drinks are provided by the employer aren't all that uncommon. And, as holiday season approaches, you might be getting to host a Christmas party where alcohol will be served. The following cases illustrate the kinds of liability risk you face if employees who drink at work cause accidents while driving after work ends.

#### EMPLOYER IS LIABLE


##### FACTS

A supervisor tells a worker assigned to a crew erecting a display for a trade show at a local stadium to bring his car to work so he can transport some items for the job. During a break from the hot and physically demanding work, a supervisor provides large quantities of beer for the crew. The worker and his crew mates consume the beer during breaks. After work ends, the worker and a co-worker walk to 2 bars and drink some more. While driving home, the worker drives into a ditch and suffers injuries that render him a quadriplegic. He sues his employer for negligence.

##### DECISION

The BC Supreme Court finds the company 75% responsible for the accident and awards the worker \$2.7 million in damages.

##### EXPLANATION

The employer admitted that it had a duty of care to the worker. But it claimed that the worker wasn't impaired when his shift ended and that it wasn't responsible for what the worker did after work. The court disagreed. Because the employer actually supplied the beer, it had a duty to monitor how much workers drank and prevent them from driving while impaired. Supervisors didn't restrict or monitor workers' drinking. To make matters worse, the supervisor specifically required the worker to bring his car to work and knew that he'd be driving home. So, the court said the employer essentially made drinking and driving part of the working conditions that day. Based on how much the worker drank, he *must have* shown visible signs of impairment when the shift ended and *before* he went to the bars. But the employer did nothing to stop him from driving home. 

*Jacobsen v. Nike Canada Ltd.*, [1996] CanLII 3429 (BC S.C.), Feb. 22, 1996

#### EMPLOYER ISN'T LIABLE


##### FACTS

A plant worker who has previously participated in an alcoholism treatment program through the plant's Employee Assistance Program (EAP) drinks a lot before he comes to work. He continues to drink while on duty, sneaking out to his truck on breaks for beer and rum-and-Cokes. Still, he works without incident and shows no signs of impairment. He drives home safely and has a few more drinks. He then drives to a friend's place to play poker and crashes into another vehicle on the way. The driver of the other vehicle sues the worker *and* the employer. The worker settles, but the employer goes to trial.

##### DECISION

The Ontario Court of Appeal rules that the employer isn't liable for the accident.

##### EXPLANATION

The victim argued that once the worker notified the employer that he was an alcoholic and participated in the EAP, the employer had a special duty to monitor and control his drinking and a duty of care to anyone who came into contact with him after work. But the court disagreed. The employer *did* have a duty of care to the worker. And if it knew or should have known that he was drunk at work, it would have had a duty to prevent him from driving. But the employer *didn't* know that the worker was drunk. And unlike the employer in *Jacobsen*, it didn't actually provide the alcohol. The worker did his job that night without any problems. He intentionally took steps to conceal any signs of impairment from his supervisor. He drove home from work without incident and it was only after he got home, had more to drink and got behind the wheel again that the accident took place. 

*John v. Flynn*, [2001] CanLII 2985 (ON C.A.), June 28, 2001

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