

HR Compliance

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

INSIDER

Volume 7 Issue 8

ABSENTEEISM

Can You Discipline Ill/Injured Employees for Missing Too Much Work?

THIS STORY WILL HELP YOU

Legally discipline—or terminate—employees for “non-culpable” absenteeism

You have the right to expect employees to actually show up for work and do their jobs. Accordingly, missing too much work is legitimate grounds for discipline and termination. At least it is in theory. In the real world, termination for absenteeism is difficult to defend in court or arbitration—especially where the absence is the result of an illness or injury. In fact, such discipline can render the employer liable for disability discrimination. Here’s a look at the legal challenges and what HR directors can do to overcome them.

CONTINUED ON PAGE 2

PRIVACY

How to Avoid Privacy Violations When Screening Job Applicants

THIS STORY WILL HELP YOU

Keep your reference checking and pre-employment screening activities within privacy limits

All employees have privacy rights vis-à-vis their employers. (See LAWSCAPE on page 11 below to see where these rights come from.) But the privacy rights of *job applicants* of individuals who haven’t been and may never be hired by your organization remain cloudy. To clear things up, the *Insider* sat down with one of Canada’s leading privacy officials, Elizabeth Denham. Before becoming BC Information and Privacy Commissioner in May 2010, Ms. Denham served as the Assistant Privacy Commissioner of Canada from 2007-2010 and the Director, Private Sector for the Office of the Information and Privacy Commissioner of Alberta from 2003-2007. Here are a dozen FAQs based on an edited version of the transcript of our exclusive interview with Commissioner Denham.


CONTINUED ON PAGE 9

August 2011

FEATURES


Absenteeism 1


When is missing too much work due to an illness/injury grounds for termination?

 Model Attendance Management Policy (p. 4)

Privacy 1

Job applicant privacy. An exclusive interview with the BC Privacy Commissioner.

 LAWSCAPE (employee privacy rights) (p. 11)

 Checklist (p. 11)

REGULARS

HR Month In Review 5

Key legal changes and cases in each province, territory and federally

Accessibility: Law of the Month 5

The new Ontario employment accessibility regulation & how to comply.

Termination 12

Winners & Losers: When is harassment grounds for constructive dismissal?

IN FUTURE ISSUES

How to Comply with Employee Accessibility Requirements

Building Your Corporate Career Website: 12 Do's & Don'ts

Reprisals: Expressing Safety Concerns ≠ Immunity from Discipline

Monitoring Employee Laptop Usage: How Far Can You Go?

HR COMPLIANCE INSIDER BOARD OF ADVISORS

Hugh A. Christie
Gowling, Lafleur, Henderson, LLP
Toronto, ON

David S. Cohen, EdD
Strategic Action Group
Toronto, ON

Vicki L. Giles, LLB
McLennan Ross LLP
Edmonton, AB

Maria McDonald, LLB
Dykeman Dewhurst O'Brien LLP
Toronto, ON

Ken Krohman
McKenzie Fujisawa
Vancouver, BC

Greg McGinnis
Heenan Blaikie
Toronto, ON

Robert Smithson
Smithson Law LLP
Kelowna, BC

R. Ross Wace
Wace & Associates
Mississauga, ON

DISCIPLINE FOR NON-CULPABLE ABSENTEEISM CONTINUED FROM FRONT

WHAT THE LAW REQUIRES

All absences are not the same. So called “culpable absences,” such as where employees play hookey or *deliberately* don’t show up for work are like any other discipline-worthy offence. The legal complications arise when missed work is the result of “non-culpable” absences such as illness, disability or other circumstances beyond the employee’s control. Non-culpable absence *can* be justifiable grounds for discipline. But it’s subject to 2 major legal restrictions:

Absence must “frustrate” contract: The legal basis of discipline for non-culpable absenteeism is a theory called “frustration of contract.” The argument is that the absence—although non-culpable—still defeated the purpose of the employment contract by making it impossible for the employee to do the job she was hired for.

Discipline must be consistent with duty to accommodate: Another major issue is the fact that many if not most illnesses and injuries that lead to non-culpable absenteeism are considered “disabilities” under human rights laws. Disciplining employees because they’re disabled is illegal. You also have to accommodate disabled employees to the point of undue hardship.

7 STEPS TO ENSURE COMPLIANCE

Here’s how to ensure that discipline is meted out in accordance with the rules of frustration and your obligation to accommodate under human rights laws:

1. Create Absenteeism Policy

The starting point is to establish a written policy on absenteeism that sets out acceptable attendance criteria for different positions and procedures to deal with employees who don’t meet the criteria. You may have to negotiate the terms of the policy with the union as part of the collective agreement; if employees aren’t in a union, refer to the policy in the individual’s employment contract.

2. Distinguish between Culpable and Non-Culpable Absences

Define both culpable and non-culpable absences. Spell out that any absences resulting from injuries and illnesses that are considered “disabilities” under the human rights law are “non-culpable.” But keep in mind that only illnesses or injuries that carry a degree of permanence are “disabilities.” Thus, employees with the flu or even broken legs wouldn’t be considered “disabled.” This would be true even if such injuries *are* deemed work-related under workers’ comp. Thus, it might not be advisable to make compensability under workers’ comp a criterion for defining an absence as non-culpable.

3. Set Right to Collect Medical Information to Classify Absence

Wherever you decide to set the boundaries between culpable and non-culpable, you’re going to need to collect medical information from employees to determine which kind of absence you’re dealing with before deciding how to respond. So require employees to furnish appropriate medical information documenting their condition, either directly or by giving you consent to contact their doctor. Of course, you must recognize and respect the employee’s privacy rights. *Basic rule:* You can ask for information about the employee’s current capabilities and prognosis but not a diagnosis.

4. Determine If Absence Is Excessive

If you determine that an absence is culpable, you can take off the kid gloves and impose discipline the way you do with other offences; but if it’s non-culpable, you must prove that it frustrates the

HR Compliance **INSIDER**

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

MANAGING EDITOR:
GLENN S. DEMBY

CONTRIBUTING WRITERS:
PAULA SANTONOCITO
SHERYL SMOLKIN

PRESIDENT AND CEO: ROB RANSOM

HR Compliance Insider is published by Bongarde Holdings Inc. and is intended for in-house use only – commercial reproduction is a violation of our copyright agreement.

This publication is designed to provide accurate and authoritative information on the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal or other expert assistance is required, the services of a competent professional should be sought.

To order a subscription to *HR Compliance Insider* for \$397/12 months – please call our customer service center at 1-800-667-9300. Fax 1-250-493-1970 or visit our website at <http://www.safetysmart.com>

Publications Mail #40065442.

Printed in Canada.



CONTINUED ON PAGE 3

employment contract before you can resort to discipline. First, you must show that the absence is “excessive.” There are 2 sets of factors to consider in making this evaluation:

Length of Absence: The absence must be significantly longer than the workplace average absence for the position over a sustained period of time. Based on court and arbitration rulings, the unofficial line is at least 2 to 3 times longer than average, suggests Alberta lawyer, Vicki Giles.

Disruption to Business: Excessiveness isn’t just about counting days; it looks at how the absence affects operations and efficiency. As explained by one Ontario court, absences of relatively short duration may frustrate a contract “when the employee is a senior executive” critical to the business’s success, whereas “employees with lesser roles in the business” need to be absent longer before frustration occurs [*Naccarato v. Costco Wholesale Canada Ltd.*, [2010] O.J. No. 2565, June 15, 2010].

5. Determine Prospects for Return

Frustration isn’t a punishment for missing work; it’s a remedy to let employers out of an employment relationship that the absence has defeated. The point of frustration is reached only if the relationship can’t be salvaged going forward. So, you can’t win if there’s a “reasonable likelihood” that the employee will return to regular attendance “in the foreseeable future.”

Evaluation of “reasonable likelihood” of return must be based on the most recent medical evidence about the employee’s condition and future prospects, including the nature of the illness or injury in terms of permanence, whether the employee can ever be expected to return and, if so, when and under what restrictions.

Example: Six month leave of absence doesn’t frustrate contract of manager with 30 years of service who’s willing and medically cleared to return to a reduced-hour schedule [*Altman v. Steve’s Music Store Inc.*, [2011] O.J. No. 1136, March 8, 2011].

Example: Seven year absence frustrates employment of physiotherapist where 3 efforts to return to limited work fail and doctor offers no medical evidence to suggest an individual in her condition would ever be able to perform the duties of a physiotherapist in reasonably foreseeable future [*Health Sciences Assn. of Alberta v. David Thompson Health Region*, [2007] A.G.A.A. No. 35, May 10, 2007].

Practical Pointer: Unless the collective agreement specifies otherwise, the medical evaluation must come from the employee’s doctor. The best way to get the medical information you need to make the “reasonable likelihood” determination, says Giles: Directly ask the doctor: “Is there a reasonable likelihood that this employee can return to regular attendance in the foreseeable future.” It may sound obvious but many employers try to get too cute and don’t phrase doctor questions the right way, adds Giles.

Insider Says

Don’t automatically follow the lead of the disability insurer with regard to the employee’s recovery. “Disability insurers are often wrong,” cautions Giles. “So make your own evaluation.”

6. Ensure Discipline Doesn’t Violate Duty to Accommodate

Accommodations required by human rights laws typically include tolerating long periods of absence for employees to undergo treatment and recover—18 months is the unofficial minimum employers are expected to wait, suggests Giles. Other forms of accommodation include letting employees return to reduced or modified work and/or providing periodic time off to see doctors for continued treatment of their disability after they return.

But you needn’t make accommodations that would impose undue hardship on your business. The problem, of course, is that it’s hard to tell when a requested accommodation crosses the line into undue hardship.

Each case must be evaluated individually based on all of the medical and work circumstances involved. You *can’t* meet your duty to accommodate by imposing blanket policies and procedures that purport to treat all employees and situations the same way. Thus, automatic penalties for absences are highly problematic. Of course, in the world of accommodations, nothing is ever set in stone.

Example: A hospital was allowed to fire a nurse for being absent longer than a predetermined limit set out in a collective agreement. Even though each absence must be considered based on its particular circumstances, the Supreme Court of Canada okayed the fixed limit because it was negotiated by the union and reflected a “consensus” among the parties “most familiar with the circumstances of the particular enterprises” on how long an absence could last before it causes undue hardship to the employer [*McGill University Health Centre v. Syndicat des employés de l’Hôpital général de Montréal*, [2007] 1 S.C.R. 161, Jan. 26, 2007].

Practical Pointer: Both sides must participate in the accommodation process. Thus, non-co-operation by an employee, e.g., in refusing to provide medical records or adhere to treatment plans, ends your accommodation obligations and gives you the right to terminate. Involving the union often speeds up the accommodation process and makes positive outcomes more likely, according to experts.

7. Consider Adopting Attendance Management Policy

One of the best ways to carry out the 6 steps this story outlines is to establish an attendance management programs (AMP) that allows you to implement non-disciplinary corrective measures to deal with employees with attendance problems and disciplinary steps if those measures don’t lead to improvement. AMPs have proven effective in getting non-culpable absenteeism under control. But they’re also controversial and have been

DISCIPLINE FOR NON-CULPABLE ABSENTEEISM CONTINUED FROM PAGE 3

challenged by unions as a violation of the employer's duty to accommodate. The validity of the argument depends, in part, on where in Canada it's made. There are currently 2 schools of thought:

AMPs Are Inherently Discriminatory (BC): In BC, courts have held that the AMP systematically singles out people with disabilities for differential treatment because they're disabled. Making missed time the basis for bringing an employee into the AMP process even if it's due to a disability is inherently inconsistent with an employer's duty to accommodate, the logic goes. The best and most recent expression of this view comes from a 2010 BC Court of Appeal case called *Coast Mountain Bus Co. Ltd. v. Nat. Automobile, Aerospace, Transp. And General Workers of Canada (CAW-Canada), Local 111*, [2010] B.C.J. No. 1998, Oct. 15, 2010.

AMPs Are a Form of Accommodation (Fed/ON): The opposite view holds that AMPs are actually *a form of accommodation* to the extent they require the development of individualized solutions to absenteeism problems. The key expression of this view is the 2008 Supreme Court of Canada case upholding an AMP as a legitimate and non-discriminatory way to discipline employees for absences resulting from disabilities. By requiring continuing communication between the employer and the employee's

doctors to monitor absences and determine an expected rate of absence for each employee based on their disability, the AMP is by its very nature a form of accommodation, the Court reasoned [*Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40, June 27, 2008]. Courts in Ontario have also expressed this view.

Conclusion

To sum up, missing work is grounds for discipline when it's culpable absenteeism. Non-culpable absenteeism may also be grounds for discipline where:

- ✦ The absence frustrates the employee's contract; and
- ✦ The discipline doesn't violate the employee's rights to accommodations.

The best way to ensure compliance with these rules is to establish a policy that sets out clear and reasonable attendance standards and response procedures for dealing with employees who fail to meet them. If you're not from BC, it's advisable to consider framing all of this in the context of an attendance management policy. (You can adapt the Model Policy below to meet your own needs.) ✦

MODEL POLICY

ATTENDANCE MANAGEMENT POLICY

POLICY STATEMENT: All employees of ABC Company has an obligation to regularly perform the functions they were hired to do. ABC Company is also committed to working with and helping employees who have illnesses, injuries or other conditions beyond their control that cause them to miss work or prevent them from attending work regularly

PURPOSE: The purpose of this Policy is to establish standards for attendance and a framework for response, both non-disciplinary and, if necessary, disciplinary, when employees don't meet these standards in accordance with Company ABC's legal obligations, including but not limited to its right to make reasonable accommodations under the [province name] Human Rights Act.

DEFINITIONS

Culpable Absenteeism: Failure to be present for work as a result of factors within the control of the employee, including but not limited to: failure to notify, absence without leave, abuse of leave and coming to work late or leaving early without notification or excuse. Culpable absenteeism is grounds for discipline, up to and including termination.

Non-Culpable Absenteeism: Failure to be present for work due to illness, injury or other physical and mental conditions deemed to be "disabilities" under the [province name] Human Rights Act. Non-culpable absenteeism is subject to non-punitive corrective action in accordance with the terms of this Policy.

ATTENDANCE STANDARDS: Each department of Company ABC will determine the average number of absences and rate of attendance that is standard for each position over the course of a year. Absences in such calculation will include [define, e.g., illnesses with or without pay, etc.]

ATTENDANCE REVIEW: Employees who fail to meet the attendance standards established by their department will be subject to attendance review. [Describe how attendance review works, including who performs it, the criteria, etc.]. Attendance review will determine whether the absence is culpable or non-culpable.

RESPONSE TO CULPABLE ABSENCES: If it's determined that the employee's failure to meet attendance standards was the result of culpable absenteeism, the situation will be treated as a disciplinary matter subject to the ABC Company Progressive Discipline Policy.

RESPONSE TO NON-CULPABLE ABSENCES: If it's determined that the employee's failure to meet attendance standards was the result of non-culpable absenteeism, the situation will be treated as a matter of non-disciplinary attendance management and subject to the following procedures.

Initial Meeting: ABC Company will conduct an informal interview with the employee to: i. Notify him/her of its concerns with attendance; ii. Explain the impact of absences on work operations; iii. Set expectations for improved attendance; and iv. Identify resources available to the employee for help.

Formal Meeting 1: If the employee's attendance fails to improve in the 6 months after the Initial Meeting due to illness or injury, ABC Company will hold a formal meeting and issue a formal letter to: i. Notify him/her of its concerns with attendance; ii. Explain the impact of absences on work operations; iii. Set expectations for improved attendance; iv. Give him/her an opportunity to explain the reasons for his/her absenteeism; v. Identify resources available to the employee for help; and vi. Set out a course of action.

Formal Meeting 2: If the employee's attendance fails to improve in the 6 months after Formal Meeting 1 due to illness or injury, ABC Company will hold a second formal meeting and issue a second formal letter to: i. Notify him/her that current attendance levels are unacceptable; ii. Give him/her an opportunity to explain the reasons for his/her absenteeism; iii. Identify resources available to the employee for help; iv. Set out expectations for satisfactory improvement; and v. Set out a course of action and potential consequences of failure to comply, including imposition of discipline.

Formal Meeting 3: If the employee's attendance fails to improve in the 6 months after Formal Meeting 2 due to illness or injury, ABC Company will hold a third and final formal meeting and issue a third and final formal letter to re-state the points of Formal Meetings 1 and 2 and set out expectations of improvement and potential consequences of failure to achieve it, including termination. ✦



HR MONTH IN REVIEW

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

LAW OF THE MONTH

The New Ontario Employment Accessibility Standard

The Ontario accessibility standard for employment is a done deal and officially takes effect July 1. What does it mean? Here's a quick overview of the law, how it affects you and what to do to comply—right now and in the long-term.

OVERVIEW

What Is Accessibility: Accessibility means removing barriers that keep people with disabilities from participating in different aspects of life, including physical accommodations like installing wheelchair ramps on stairways, and administrative allowances like waiving a no-pets policy for tenants with service animals.

What Is the Employment Accessibility Standard: In 2005, Ontario passed a law called the *Accessibility for Ontarians with Disabilities Act* (AODA) giving the Ministry of Community and Social Services authority to adopt accessibility standards for different activities. On June 3, the Ministry issued the final AODA accessibility standard for employment.

What the Standard Requires: Employers must take 7 sets of measures to make their workplaces accessible:

Recruitment & Hiring: Employers must notify job applicants of their right to request accommodations to pre-employment assessment materials and procedures, e.g., job application forms in Braille. Employers must also explain their accommodation policies for employees to disabled job applicants to whom they offer jobs.

Individual Accommodation Plans: Companies with 50 or more Ontario employees must establish a written process for developing individualized accommodation plans for each disabled employee addressing, among other things, how accommodations are evaluated and individual plans reviewed.

Communication Formats: Employers must provide information disabled employees need to do their job and information that's generally available in the workplace in "accessible formats" and using appropriate "communication supports," e.g., intranet services that provide information verbally to the visually impaired.

Workplace Emergency Response: Employers must provide individualized emergency response information to disabled employees and review it when: i. the employee moves to a different work location; ii. the employee's individual accommodation plan is reviewed; and iii. the employer reviews its general emergency response policies.


Return To Work: Companies with 50 or more Ontario employees must develop a return to work process for employees absent with disabilities, including evaluation of accommodations necessary to get the employee back on the job.

Performance Management: Performance management processes must accommodate the accessibility needs of any disabled employees to which they apply.

Career Development: Employers that provide employees career development must account for the accessibility needs of disabled employees.

Redeployment: Redeployment must take the accessibility needs of disabled employees into account.

ANALYSIS

Don't panic. Most of the required accessibility measures don't have to be completed until Jan. 1, 2016 (for companies with 50 or more Ontario employees), or Jan. 1, 2017 (if you have fewer than 50 Ontario employees). So you have a breathing space. But there is one set of measures that will require your *immediate attention*: Emergency response requirements must be completed by Jan. 1, 2012. 



NOVA SCOTIA

LAWS & ANNOUNCEMENTS

Minimum Wage






May 10: The government agreed to raise the minimum wage 35 cents to \$10 per hour—and to \$9.65 for inexperienced workers with less than 3 months' experience—effective October 1. This will be the last flat increase. Starting next year, the minimum wage will be indexed for inflation every April the way it is in Yukon.

Employment Standards—Reservist Leave

May 1: Effective today, employees in the Canadian Forces reserves who've been with their companies at least a year are entitled to up to 20 days' unpaid leave for annual reservist training. Of course, reservists are also entitled to leave if they're called up for active service.

Employment Standards—Temporary Foreign Workers

May 19: The Legislature passed a law (Bill 53) expanding protections of temporary foreign workers. Highlights:

-  Broader definition of "foreign worker" protected
-  Broader definition of "recruitment" activities covered
-  Recruiters must keep written records of fees paid for 3 years
-  Recruiters can't charge fees to individuals
-  Recruiters can't make individuals repay costs of recruitment, withhold wages or take their property.

OHS

May 19: Fines for OHS violations went up for the first time since 1996. Under the bill that took effect today, the maximum fine for a first offence is \$250,000; the maximum fine for any additional offence committed within 5 years of the first offence rises to \$500,000; and the maximum fine for any offence involving a death, first or subsequent, is now \$500,000.

CASES

Court to Arbitrator: You're Not Allowed to Coach the Lawyers

It was a routine proceeding with a union claiming that dismissing an employee for unauthorized absence was failure to accommodate. But things got weird. During a break, the arbitrator strolled over to the union's lawyer: You know you can't win unless you claim the employee had a mental disability, he advised. The union took the advice and got a 12-week delay to do a psychological assessment on the employee. The employer cried foul and the court agreed. The arbitrator had no business telling the lawyers what points to argue; his job was to decide the case on the arguments that were made [*Halifax (Regional Municipality) v. CUPE, Local 108*, [2011] N.S.J. No. 230, May 12, 2011].

Stress from Work Harassment Not Covered by Workers' Comp

A worker claimed workers' comp benefits for mental stress caused by harassment on the job. The Appeals Tribunal said no dice. Although he was harassed at work, which is unacceptable, the onset of the stress was gradual and workers' comp only covers stress that's the result of an acute reaction to a discrete, traumatic event [*2011-34-AD (Re)*, [2011] CanLII 28394 (NS WCAT, May 19, 2011)].

Workers' Comp Covers Cancer Partly Caused by Second-Hand Smoke

A construction worker, who didn't smoke filed a workers' comp claim for cancer of the cell lining in his tonsils. The Appeals Tribunal ruled that the cancer was work-related. There was sufficient evidence that the disease was caused, at least in part, by the worker's exposure to occupational carcinogens, particularly second-hand smoke. Many of his co-workers smoked and did so in "job shacks," company vehicles and other areas of job sites [*WCAT #2010-112-AD*, [2011] CanLII 26314 (NS W.C.A.T.), May 10, 2011].

LAWS & ANNOUNCEMENTS**DC Pensions**

June 6: A new OSFI Guidance Note clarifies that DC plans needn't notify OSFI to transfer pension assets as long as:

- ✦ Transfer doesn't reduce value of member's account balance
- ✦ All contributions for affected members are remitted to transferring plan
- ✦ Outstanding interest or dividends earned to date of transfer are deposited to member's account in receiving plan
- ✦ Transferring members are informed of transfer and account balance
- ✦ Member's records are transferred to receiving plan.
- ✦ Annual statement required to former members
- ✦ Negotiation of distressed plan workout schemes allowed.

CASES**Court OKs Mega-Million Overtime Class Action Lawsuit against Scotiabank**

In Feb. 2010, an Ontario court ruled that 5,328 Scotiabank tellers had enough in common to file their overtime claims in a class actions damages lawsuit. Scotiabank appealed, insisting that the court follow a case called *Fresco v. CIBC* where almost identical claims were *not* allowed as a class action. But the appeals court ruled that the original Feb. 2010 ruling was "correct" and refused to overturn it. Scotiabank now has 3 options: appeal again, go to court or settle for what's likely to be a high price [*Fulawka v. Bank of Nova Scotia*, File No. 105/10 (ON Super. Ct. Justice), June 3, 2011].

"York Street Steps" Accessibility Case Settles After 17 Years

The National Capital Commission (NCC) agreed to create a new committee to provide guidance on ensuring accessibility to disabled people. The agreement was brokered by the Canadian Human Rights Commission in mediating a settlement to a dispute that began back in 1994 when NCC constructed the York Street Steps staircase linking its Sussex Drive to Mackenzie Avenue offices in Ottawa [Canadian Human Rights Commission Press Release, May 27, 2011].

LAWS & ANNOUNCEMENTS**Internships**

May 30: The new Servicing Communities Internship Program (SCiP) will award post-secondary students a \$1,000 bursary for completing an internship with nonprofit organizations in the province. See, www.joinscip.ca.

Workers' Compensation

May 10: Bill 20, which would extend the presumption that certain cancers are work-related when suffered by firefighters to not only full-time but part-time, volunteer and casual firefighters, received first reading and is expected to pass. BC, MB, ON, NS, NT and NU have adopted similar laws.

Workplace Safety

May 1: The province's 2010 lost-time claim rate of 1.41 injuries for every 100 full-time jobs is the lowest in 20 years, and has declined for 10 straight years. But rates of fatal injuries increased an alarming 24% to 78 fatalities per million full-time jobs. There were 136 workplace fatalities last year, as compared to 110 in 2009.

CASES**Union Can Fire Employee Representative After She Loses Her Job**

Getting fired cost a telecom employee not only her job but her elected and salaried position as union agent. The employee claimed that both dismissals were unjust and lost on both fronts. Individuals had to be employees to be elected to union office under the union's bylaws. Once the employee lost her employment, she was no longer qualified to serve as a union official, the court explained [*Williams v. Telecommunications Workers Union*, [2011] A.J. No. 542, May 11, 2011].

Workers' Comp Covers Shoulder Pain Caused By Use of Touchscreen

A company put in a new touchscreen and keyboard system. Four days later, an employee using the system developed shoulder pain and tendonitis. Workers' comp denied her claim but the appeals Commission reversed. The touchscreen forced the employee to assume an awkward position with her arm fully extended at or above shoulder level, the Commission explained in finding the injury work-related [*Decision No. 2011-317*, [2011] CanLII 22857 (AB W.C.A.C.), April 18, 2011].

LAWS & ANNOUNCEMENTS**Payroll**

July 1: Remember that today is the day the basic personal amount (and spouse or common-law partner amount) increases from \$8,134 to \$8,384. The change is *retroactive* to Jan. 1, 2011. So, employers should apply a prorated basic personal amount of \$8,634 for the remaining 6 months of the year, beginning with the first July payroll. Exception: Option 2 thresholds should not be prorated.

Minimum Wage

May 26: The government announced that the minimum wage will increase 50 cents to \$10 an hour on Oct. 1. Labour representatives on the Review Committee wanted a 75 cent increase; management reps wanted to limit it to 30 cents.

Accessibility

June 1: Manitoba became the latest province to tackle accessibility for the disabled. Newly introduced Bill 47 would appoint an advisory council to study barriers to accessibility and develop legislation to remove them.

Workers' Compensation

May 6: Under the terms of a new bill, the presumption that certain cancers are work-related when suffered by firefighters would also apply to individuals who investigate fires and train firefighters. Heart injuries within 24 hours of an emergency response would also be presumed work-related.

Workplace Violence

May 3: The government is drafting regulations requiring healthcare facilities to develop a violence prevention policy and strategy, including ensuring emergency security assistance is immediately available. The new rules are expected to be in place by the end of August.

Pensions—Reform

May 30: The Assembly tabled the latest round of pension changes. Highlights:

- ✦ Let Superintendent order companies to make pension contributions
- ✦ Superintendent liens on corporate property for unpaid contributions
- ✦ Make directors liable for contributions their companies don't make
- ✦ Administrative monetary penalties for pension violations.

Public Pensions—Reform

May 26: Highlights of proposed changes to the *Civil Service Superannuation Act*:

- ✦ Employee contributions to be set by joint recommendation of Employer Pension and Insurance Advisory Committee and Superannuation and Insurance Liaison Committee
- ✦ Continuity of pension contributions for reservists on military leave
- ✦ Phased retirement allowed for civil servants.

LAWS & ANNOUNCEMENTS**Workplace Safety**

May 20: The Yukon Workers' Compensation Health and Safety Board's 2010 Annual Report shows an operating surplus of \$14.7 million. There were about 1,500 more workers in Yukon in 2010 than the previous year. Despite this increase, the lost-time rate per 100 workers dropped to 2.2 compared to 2.4 in 2009. There were also 2 workplace fatalities last year.



BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS

Minimum Wage

May 1: A 75¢ increase in the BC minimum wage to \$8.75 per hour took effect. The old first/job/entry level minimum wage for employees with fewer than 500 hours of paid work experience (which was \$6) has been eliminated. It's the same minimum wage everywhere.

Job Training

May 19: The new Targeted Skills Shortage Pilot will provide \$3 million to help low-skilled employees acquire the post-secondary training necessary to fill positions in 4 high-growth sectors for which skilled labour is currently in short supply: transportation and warehousing; manufacturing; health care and social assistance; and professional, scientific and technical services.

Work Refusals

May 25: WorkSafeBC changed its guideline on dangerous work refusals. Highlights:

- ✦ New definition of "undue hazard" justifying refusal
- ✦ Explanation of test for determining if workers have reasonable cause to believe undue hazard exists
- ✦ Clarification of requirement to further investigate a work refusal in the presence of other parties.

Workplace Safety

May 6: According to WorkSafeBC's 2010 annual report, the provincial injury rate fell from 2.34 per 100 person years of employment in 2009 to 2.27. The rate of *serious* injury didn't decline as quickly. In 2009, serious injuries rose to 35% of the overall injury rate—and to 37% in 2010. And there were 143 fatalities in 2010 (121 in 2009). More than 50% of those fatalities were related to occupational disease.

CASES

Ultimatum Not Resignation But Grounds to Terminate

A bank manager objected to a stream of letters from her supervisor critical of her performance as both untrue and a violation of her privacy. Shortly after returning from a 9-month disability leave, her lawyer sent the company a letter: Apologize to my client in writing or we'll sue. The company wrote back: We ain't apologizing; and if you want to sue, bring it on. The manager left and claimed constructive dismissal. The ultimatum was *not* a resignation, said the court, because it didn't indicate the manager's intention to leave. But it was "disrespectful and inflammatory," and coupled with all of the manager's performance problems, constituted grounds for termination [*Grewal v. Khalsa Credit Union*, [2011] B.C.J. No. 925, May 18, 2011].

Temporary Foreign Worker Fired in Retaliation

A temporary foreign worker from the Philippines recruited to work as a manager at Denny's claimed he was fired for filing a claim against the recruitment firm for illegal fees and complaining about unpaid overtime. The BC Employment Standards Branch agreed and awarded him \$6,617 in unpaid wages [*Northland Properties Corp. (c.o.b. Denny's)*, ER #: 067-767, April 29, 2011].



NEW BRUNSWICK

LAWS & ANNOUNCEMENTS

Pensions

May 13: Bill 16, which would require plans to include common-law partnerships in calculating commuted value of pensions upon plan division, received third reading. The bill defines what individuals are "common-law partners" entitled to benefits and requires determination of commuted value as of the breakdown date of the common-law partnership.

Drug Testing

May 6: The Human Rights Commission issued new guidance on workplace drug and alcohol testing. Highlights:

- ✦ Drug and alcohol testing *prima facie* discrimination, i.e., in lawsuits employers must prove testing is reasonably necessary
- ✦ Pre-employment testing only in limited cases, e.g., reasonable cause
- ✦ Random drug testing not allowed except for truck and bus drivers
- ✦ Random alcohol testing not allowed except for safety-sensitive jobs.

CASES

Fired Managers of Acquired Company Claim Severance Ripoff

Two senior managers fired without cause signed a severance agreement requiring them to sell back their company shares at less than market value. 12 months later, the company was sold to a third party for \$225 million. The managers sued, claiming that they'd have gotten another \$5 million each if they still worked for the company and had their shares. But the court found no "oppression" and threw out the case. The company didn't fire the managers and conclude the severance agreements to deliberately deprive them of a huge capital gain on company stock since at the time it didn't know the company would be sold [*Doucet v. Spielo Manufacturing Inc.*, [2011] N.B.J. No. 153, May 12, 2011].

Are Worker's Respiratory Problems Work-Related?

A power company worker claimed that his respiratory problems were caused by workplace exposure to the chemical Vanadium. The workers' comp Appeals Tribunal ruled that the worker was entitled to benefits and the court upheld the Tribunal's ruling as reasonable. There was sufficient evidence that Vanadium causes respiratory problems like the ones the worker had and that the worker was, in fact, exposed to Vanadium at work [*New Brunswick Power Generation Corp. v. WHSCC*, [2011] NBCA 47 (CanLII), May 19, 2011].



NT

LAWS & ANNOUNCEMENTS

Employment Standards

May 19: Bill 21, which would provide members of the reserve force unpaid leave for military service received second reading. To qualify for leave, employees must have at least 6 consecutive months of service with the employer and provide notice within 4 weeks or "at the earliest reasonable opportunity." Employers have the right to ask for an official certificate confirming the employee's need to leave for service.



NL

LAWS & ANNOUNCEMENTS

Labour Relations

May 31: Changes to the labour relations law making it easier for new companies or bargaining representatives to get a negotiating relationship going received Royal Assent. Highlights of Bill 10:

- ✦ Employers or employees in new bargaining situations can ask Labour Relations Board to impose first collective agreement for 18 to 36 months
- ✦ No strikes or lock outs where Board imposed first collective agreements are in effect
- ✦ New arbitration and grievance procedures to speed up settlements.



PE

LAWS & ANNOUNCEMENTS

Minimum Wage

Jun. 1: The minimum wage goes up 30¢ to \$9.30 today, then to \$9.60 on Oct. 1, and to \$10 on April 1, 2012.



NU

LAWS & ANNOUNCEMENTS

Mining

June 2: Sabina Gold and Silver Corp. announced the sale of its properties in the silver-rich Kitikmeot region to zinc mining giant, Xstrata for \$50 million in cash. Xstrata plans to spend an additional \$50 million over 4 years to explore the properties to determine the feasibility of silver mining operations.



QC

LAWS & ANNOUNCEMENTS

Minimum Wage

May 1: The regular minimum wage increased from \$9.50 to \$9.65 and the minimum wage for employees receiving tips went up from \$8.25 to \$8.35. There are roughly 292,000 minimum wage earners in the province.

Workers' Comp

May 31: Average workers' comp premiums for 2012 will be \$2.13 per \$100 of assessable payroll, 6 cents lower than this year. Although CSST is still in the red, annual accident rates have declined 37% over the past 10 years.

**LAWS & ANNOUNCEMENTS****OHS Reform**

June 1: Bill 160 got Royal Assent and became law. The headline maker is the reshuffling of the OHS enforcement agencies, i.e., the MOL and WSIB and establishment of a new Chief Prevention Officer, but the changes that will most immediately impact employers:

- ✦ Make it easier for employees who raise safety concerns to claim reprisal
- ✦ Authorize OHS “awareness training” of new workers and supervisors
- ✦ Require training for health and safety representatives.

Employment Standards

May 31: The bill (Bill 181) allowing for mandatory retirement at age 60 of firefighters who respond to emergencies passed and will take effect 2 years from the date it’s proclaimed. *New wrinkle:* The bill was changed at the last moment to cover both firefighters that do and *don’t* have a provision in their current collective agreement requiring them to retire at 60.

Pensions—Funding

May 20: The government issued regulations implementing PBA changes in Bill 120. Highlights:

- ✦ Mandatory annual valuation for DB plans with funding below 85% (as opposed to 80%)
- ✦ DB plans must list information on funding levels in annual statement to members
- ✦ Solvency funding exemption for jointly sponsored pension plans existing before Aug. 24, 2010
- ✦ Exempt joint plans still must file valuation reports and report to members
- ✦ Temporary funding relief for public sector plans.

Pensions—Multi-Jurisdictional Issues

May 9: Ontario and Québec agreed to work out a set of common rules to determine the benefits of plans registered in one of the provinces but which pay benefits to members or former members in both. Taking it a step further, the agreement allows for the creation of a single agency empowered to regulate multi-jurisdictional plans in both provinces.

CASES**One Year Non-Compete Is Over Broad and Unreasonable**

A chemical manufacturer fired a “technical salesperson” with 17 years of service and sued to prevent him from dealing with any of its clients for a year. The court agreed. The salesperson had inside knowledge of company products, business methods and clients and his contract clearly banned all competition for a year. But the appeals court saw it differently. Sure, the agreement was clear. But it was also overly broad and unreasonable. Company clients were in all parts of Canada and many US states and the company could rely on the confidentiality provisions of the contract to protect its interests, said the appeals court [*Mason v. Chem-Trend Limited Partnership*, [2011] O.J. No. 1994, May 3, 2011].

VP Retires Too Early to Get Full Pension

A senior VP and CFO who retired at age 52 claimed he was due a full pension when he turned 62. No dice, said the judge. The plan documents clearly stated that a member had to be between 55 and 62 to qualify for an early retirement pension; and nothing in the law mandates paying a full pension to a member who retires when he’s 52 [*Revisos Canada Ltd. v. Creber*, [2011] O.J. No. 2038, May 3, 2011].

White Cabbie Can Sue for “Colour” Discrimination But Can’t Prove Claim

If an employee isn’t a person of colour but is thought to be one and loses his job, in part, because of that perception, can he sue for discrimination? He sure can, said the Human Rights Tribunal in a case where a white cabbie claimed he was fired because of complaints from a customer who thought he was a “Paki.” The cabbie’s claim would have been grounds for discrimination on the basis of “colour” if it were true. Unfortunately for the cabbie, the Tribunal didn’t believe it was true and tossed out his case [*McLary v. Universal Supply Group Inc.*, [2011] O.H.R.T.D. No. 898, May 9, 2011].

OHS Incident Reporting Requirements Cover More than Just Workers

The MOL charged a ski resort with failing to file an injury report after a guest drowned in the indoor pool. We didn’t have to report the incident under the OHS law because the guest wasn’t a worker, the resort argued. But the Labour Relations Board sided with the MOL. The OHS laws say employers must report workplace fatalities or critical injuries to a “person,” not a “worker.” A guest is clearly a person; and the pool was also part of the workplace [*Blue Mountain Resorts Ltd. v. Ontario*, [2011] ONSC 3057 (CanLII), May 18, 2011].

OK for Public Interest Organization to Participate in Union’s Pay Equity Suit

A public interest organization dedicated to equal pay for equal work wanted to participate in a private union lawsuit against a company for allegedly paying women less than men for the same work. The Pay Equity Tribunal said the organization could submit a 20-page brief setting out its views on pay equity 30 days before the trial but couldn’t introduce evidence or try to influence the outcome of the case. The company appealed but the court upheld the ruling as reasonable [*CUPE, Local 1999 v. Lakebridge Health Corp.*, [2011] O.J. No. 2258, May 20, 2011].

Employer Demands Employee’s Cell Phone Records for Discipline Query

A community living facility brought a disciplinary action against an employee for allegedly engaging in inappropriate relations with a resident. The facility learned about some supposedly incriminating text messages that the employee had sent to the resident and demanded access to his private phone records. But the court found the demand “intrusive and extraordinary” and refused to order the employee to comply. Besides, it noted, the facility already had other evidence of the relationship [*Community Living v. TBay Tel*, [2011] ONSC 2734 (CanLII), May 18, 2011].

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

May 20: With the provincial economy booming and neighbouring provinces raising their minimum wage, Saskatchewan finally joined the party and announced a 25 cent increase in the minimum wage to \$9.50 per hour, effective Sept. 1. It’s the first increase since May 2009.

Human Rights

May 18: From now on, employment discrimination and other human rights complaints that can’t be resolved by mediation will be decided by a court (Court of Queen’s Bench) rather than the Human Rights Tribunal. But newly adopted Bill 160 also gives the Human Rights Commission the power to throw out a case without a trial if one party refuses to accept a reasonable settlement offer from the other.

Whistleblower Protection

May 18: A new whistleblower protection law, Bill 147, passed the legislature and will take effect upon proclamation. Highlights:

- ✦ Covers public employees
- ✦ Applies to allegations involving danger to life, health and the environment and/or gross mismanagement of public funds or assets
- ✦ Agencies must follow procedures in responding to disclosures of wrongdoing by public servants.

Immigration

May 16: From now on, foreign skilled workers nominated through the Saskatchewan Immigrant Nominee Program applying for an extension to their temporary foreign resident status will be able to keep their health coverage while the federal government processes their application. The change removes the hardship that comes with loss of coverage during the permanent residency application waiting period.

LAWS & ANNOUNCEMENTS cont’d**Pensions**

May 24: The new statistical report of the Pensions Services Division of the Financial Services Commission reveals a deteriorating funding situation:

- ✦ Total DB funding deficit of \$340 million, as compared to \$300 million *surplus* in 2009
- ✦ Unfunded liabilities up 62% from \$402 million to \$653 million
- ✦ 187 DB plans in deficit, 64 plans in surplus.

CASES**Laid Off Employee’s “Snarky” Last-Day E-Mail ≠ Just Cause**

On his last day of work, a laid off regional sales manager wrote his customers an email thanking them for their support and ruing the “diminishment of service” layoffs portended. “It’s a shame that the corporation doesn’t feel the need to provide support” to you, he wrote. The company claimed the email was just cause for termination and tried to nullify the manager’s severance deal. But the court said no. The email was little more than a “snarky parting shot from a mid-level employee pushed out the door” and there was no evidence customers took it seriously [*Anderson v. Culligan of Canada Ltd.*, [2011] S.J. No. 301, May 10, 2011].

1. How One Jurisdiction's Law Affects Employers in Other Provinces

Question: Would you mind explaining for our readers not in BC how guidance from BC—or any other particular province where they don't do business—is relevant to them?

Answer: Having been involved in regulating privacy in 3 jurisdictions, I know just how freely privacy regulators across Canada share information and, in some cases, conduct joint research. As a result, guidelines developed in one province are sometimes viewed as best practices for employers across the country.

2. Privacy Protections for Unsolicited Resumes

Question: What privacy concerns should HR directors have when they receive an unsolicited resume but aren't currently seeking to hire?

Answer: The *BC Personal Information Protection Act* (PIPA), for example, imposes a one-year retention requirement on personal information used to make employment decisions. But if there's no job opening, you're not actually making a decision using the personal information in the unsolicited resume. So, the one-year retention requirement wouldn't apply. However, even if you don't retain unsolicited resumes, you must dispose of them carefully, including shredding paper copies and deleting electronic files.

3. Privacy Protections for Unsolicited Resumes Retained

Question: What if I decide to keep the unsolicited resume in case an opening does arise?

Answer: In that case, you're considered to have "collected" the resume and all of the obligations under PIPA are in play. That means the individual has the right to access that data. It also means that you must safeguard the data and dispose of it in a timely and secure way.

4. Information You Can Ask Job Applicants for

Question: What information can a prospective employer ask a job applicant to provide?

Answer: The basic rule is that during the hiring process, you can request any personal information that's reasonably relevant. Information is deemed reasonably relevant if it pertains to a candidate's qualifications for a specific position, experience, knowledge, skills and abilities; it also includes responses to interview questions and skill tests the employer might conduct.

5. How One Jurisdiction's Law Affects Employers in Other Provinces

Question: When is it appropriate to do a credit check on a job applicant?

Answer: Credit checks should only be conducted if you can establish both that:

✦ The credit check information is relevant and necessary to verify the applicant's ability to perform the job function; and

✦ The verification can't be done through less intrusive means.

So, for example, a credit check would likely be appropriate for a finance-related job or one involving the handling of money but not for a secretarial position.

6. Criminal Background Checks on Job Applicants

Question: What issues do HR directors need to be aware of in conducting criminal checks?

Answer: Criminal records checks are becoming more common not just to screen job applicants but current employees. For example, some public sector employees must go through a criminal records check whenever they change jobs and at least once every 5 years. Criminal records checks are acceptable for certain positions like child care or elderly care. My concern is with requiring criminal records checks as a matter of course for all positions, including those that aren't safety-sensitive.

Question: Since April 2011, your office has also been looking into privacy issues related to employee criminal checks and in particular, the PRIME-BC database. Can you explain what's going on?

Answer: Sure. Police databases now hold significant amounts of sensitive information, including in some cases information about who called the police, has been a victim or a suspect in a crime or been charged with an offence. As a result, using police databases for pre-employment checks may be overkill and result in collection of irrelevant information about applicants that causes them to be denied an employment opportunity unfairly. The purpose of our enquiry is to ensure that the criminal record check process is fair and justifiable. Specifically, what fields of the police databases are being used for pre-employment checks and is it ethical and legal to collect and use this data for pre-employment screening? I'm also going to look at whether the various criminal background databases—of municipal police forces, the RCMP, the PRIME database, etc.—are being used consistently across the board.

7. Right to Contact References

Question: What are the privacy rules for contacting a job applicant's references?

Answer: If a job applicant lists references with contact information, they implicitly authorize the prospective employer to contact those people.

8. Right to Conduct Other Background Checks

Question: Are there any other restrictions that HR directors need to be aware of if they want to make further background checks or other inquiries about a job applicant?

JOB APPLICANT PRIVACY CONTINUED FROM FROM PAGE 9

Answer: Even though you can collect and use a prospective employee's personal information without explicit consent, except for a few situations described in PIPA, you still must tell the applicant in advance about the collection, use and disclosure of personal information and the reason for it.

Question: Suppose an applicant indicates in his resume that he belongs to a particular social group or trade organization. Does the HR director have to notify the applicant in advance if she, the HR director, wants to call up the head of that organization to ask about the applicant?

Answer: The HR director should tell the applicant in advance so it's clear that additional information is going to be collected. And it's important to be clear about the sources, especially when, for example, the individual is applying for a volunteer position.

9. Gathering Personal Information about Applicants from Social Network Sites

Question: A growing number of organizations are gathering information about applicants from Facebook profiles and other social media websites. What are the privacy implications of this practice?

Answer: This is a very interesting question because social media sites have dramatically expanded access to personal information about individuals. Applicants often believe that the things they post about themselves on their social media site are private and intended solely for the members of the social network. On the other hand, employers see that information as in the public domain and thus not covered by privacy protections. The phenomenon is new and it's not totally clear how existing privacy laws apply. But that doesn't mean that restrictions don't apply:

Accuracy Requirements: For one thing, under PIPA (and PIPEDA and BC/QC personal privacy statutes), the information the employer collects about applicants must be accurate. It's hard for employers to determine whether information about applicants on social network sites is accurate—especially when it's posted by a third party.

Collateral Privacy Violations: Going to Facebook or other social network site may also result in the collection of private information about third parties who are not applying for jobs.

Discrimination Concerns: Another danger of using social networks to unearth information about job applicants is that it may reveal information about personal characteristics that human rights laws ban employers from considering in making employment decisions such as the applicant's race, religious beliefs, political views, sexual orientation, etc.

Special Privacy Protections in Public Sector: I'd also remind HR directors of companies in the public sector of the privacy protections for public job applicants contained in the BC *Freedom of Information and Protection of Privacy Act* (FIPPA) and its non-BC equivalents. Public sector employers must consider whether other less invasive, less indiscriminate

and more reliable means of collecting personal information are available. They must also ensure that the information they collect remains and can be accessed only in Canada because of the restrictions on transport or data flows of personal information. That requirement can be very difficult to meet, particularly if the social network stores information "in the cloud."

10. Googling Job Applicants

Question: Are employers allowed to google job applicants?

Answer: Many of the same concerns that apply to checking social networks apply to googling. Although it's not as revealing as checking Facebook, googling is also apt to lead to the collection of out of bounds personal information about the applicant's race, sexual orientation, etc. Googling may also lead to the collection of personal information that's inaccurate.

11. Getting the Applicant's Consent

Question: Is it better to notify and get applicants to sign a consent before checking out their social media sites?

Answer: Absolutely. But consent isn't a silver bullet under either private or public sector privacy laws. And there will be different legal requirements depending on the context. My advice: At the very least, advise the job applicant of the information that you'll collect and how you'll use it and give him the opportunity to review and correct inaccurate information.

12. Retention of Personal Information Collected

Question: Finally, what must an employer do to protect and retain personal information about applicants collected during the hiring process?

Answer: The first thing you must do is make reasonable security arrangements to protect the information from unauthorized access, collection, use, disclosure, modification or disposal. The more sensitive the information, the more you must do to meet the standard of reasonable. Thus, for example, a job applicant's medical information requires greater protection than her resume. I'd recommend that your readers check out our [investigation reports #F06-01](http://www.oipc.bc.ca/orders/investigation_reports/InvestigationReportF06-01.pdf), http://www.oipc.bc.ca/orders/investigation_reports/InvestigationReportF06-01.pdf, for an excellent explanation of what measures are considered "reasonable."

You also have to retain for at least one year any personal information you used to make a hiring decision about the applicant, including interview notes, hiring grids and other information about or related to the assessment on applicants. Such information must be retained for any applicant considered regardless of whether they actually were offered the job.

Conclusion

To wrap up, here's a checklist of the key points Commissioner Denham made in the interview:





10 Job Application Privacy Pointers

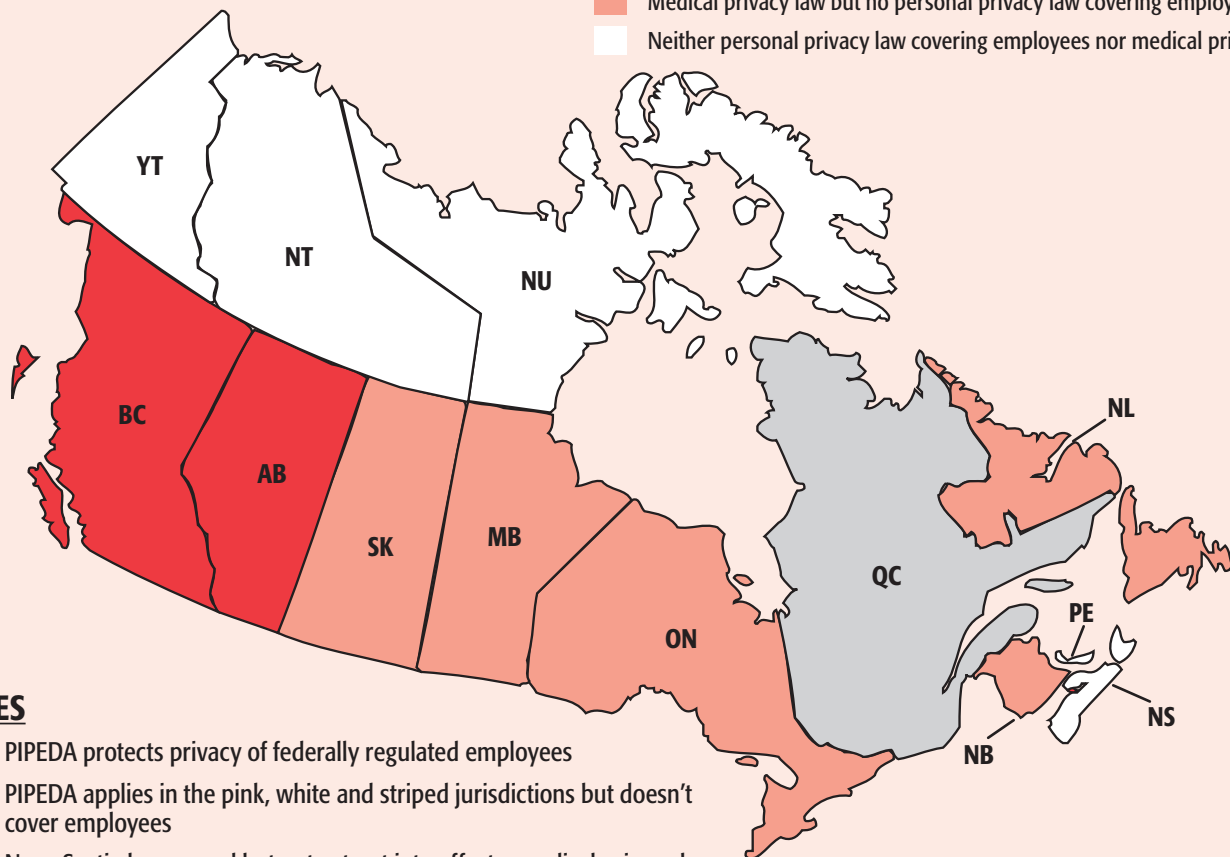
1. You don't have to retain unsolicited resumes when there's no job opening.
2. If you hang onto an unsolicited resume in case a job opens up, you must keep it secure and let the applicant see it if she requests it.
3. It's OK to ask about and/or test an applicant's experience, knowledge, skills or qualifications.
4. Credit checks are OK if information is relevant and necessary to verify an applicant's qualifications and can't be collected in a less intrusive way.
5. The same basic rules pertain to criminal checks.
6. It's OK to contact the references applicants list.
7. Collecting personal information about job applicants on Facebook could be problematic especially to the extent it reveals personal information about race, sexual orientation, etc.
8. You should notify and get applicants' consent if you do collect such information.
9. Surreptitiously checking social networking sites of current employees is acceptable if:
 - i. Monitoring is demonstrably necessary to meet a specific need;
 - ii. Monitoring is likely to be effective in meeting that need;
 - iii. The loss of privacy is proportionate the benefit gained; and
 - iv. There's no less privacy intrusive way to achieve the purpose.
10. Personal information used to make hiring decisions must be kept secure, retained for at least one year and disposed of safely thereafter. 

Sheryl Smolkin, who conducted this interview, is a Toronto lawyer and journalist who can be contacted at www.sherylsmolkin.com.






LAWSCAPE: EMPLOYEE PRIVACY PROTECTIONS IN CANADA

KEY

-  Personal privacy law covering employees and medical privacy law
-  Personal privacy law covering employees but no medical privacy law
-  Medical privacy law but no personal privacy law covering employees
-  Neither personal privacy law covering employees nor medical privacy law



NOTES

-  PIPEDA protects privacy of federally regulated employees
-  PIPEDA applies in the pink, white and striped jurisdictions but doesn't cover employees
-  Nova Scotia has passed but not yet put into effect a medical privacy law
-  All jurisdictions also have Access to/Freedom of Information and Privacy Protection laws covering government information
-  Employees may also have privacy rights under the Charter, employment agreement, other statutes and "common law," i.e., court cases made by judges

TERMINATION

WINNERS & LOSERS

When Is Harassment Grounds for Constructive Dismissal?

Providing a harassment-free workplace is an employer's implied obligation under every employment contract. But while you can adopt non-harassment policies until the cows come home, just about every workplace has a few jerks who like to tease, badger, berate or bully their co-workers. Failing to reign in such behaviour leaves you at risk of constructive dismissal claims. There's only so much harassment an employee can be expected to take. At what point does harassment by co-workers poison the work environment and give the employee grounds to claim constructive dismissal? Here are 2 cases addressing that tricky issue.

HARASSMENT = CONSTRUCTIVE DISMISSAL


FACTS

Over a three-year period, a night shift worker at a food processing plant is subjected to approximately 100 sexually inappropriate and offensive remarks by 4 co-workers. He complains repeatedly but the supervisor, who's an entrenched and highly regarded employee, brushes his complaints aside, making only one half-hearted and ineffective attempt to reign in the harassers. When the shift worker takes medical leave, the matter finally comes to the attention of HR. But the internal investigation finds no harassment. The shift worker never returns from leave and sues the company for constructive dismissal.

DECISION

The Ontario Superior Court of Justice rules the shift worker was constructively dismissed and awards him 12 months' notice.

EXPLANATION

No "reasonable" person in the shift worker's position could be "expected to persevere in these employment conditions," the court reasoned. The supervisor was a principal culprit. Not only did he fail to intervene to stop the harassment but actually found it amusing. He even threatened retaliation after learning of the shift worker's intention to go over his head. But management also shared in the blame, the court continued. Its investigation was biased and incomplete—nobody bothered to interview any of the 4 co-workers who harassed the shift worker. The company did have a zero tolerance anti-harassment policy; but its failure to implement it effectively was constructive dismissal, the court concluded. 

Disotell v. Kraft Canada Inc., [2010] ONSC 3793 (CanLII), July 20, 2010

HARASSMENT ≠ CONSTRUCTIVE DISMISSAL


FACTS

An employee named Trevor is appalled to find the phrase "Trevor blows goats" scrawled on the wall of the grocery store where he works. He marches into his supervisor's office and demands an investigation to determine which co-worker wrote the message. What happens next is unclear; but when the meeting ends, Trevor hands in his keys and storms out, never to return. The graffiti incident is never investigated. The store claims Trevor quit; Trevor insists he was constructively dismissed as a result of the store's failure to protect him from harassment.

DECISION

The Nova Scotia Court of Appeal rules that Trevor quit and wasn't constructively dismissed.

EXPLANATION

Not stepping in to prevent harassment by co-workers is grounds for constructive dismissal, the court acknowledged. But the court didn't believe that Trevor was forced out by a poison work environment the way shift worker was in *Disotell*. Trevor had quit once before over work hours and there was still bad blood. The court also noted that Trevor had raised the harassment argument late in the case, almost as an afterthought, and didn't produce any evidence to show that it caused him any mental anguish. Moreover, under the store's harassment policy, Trevor had the option to bring the matter to the attention of HR but never did. So the court basically found that the store's failure to investigate the graffiti incident, while unfortunate, wasn't the real reason Trevor left. 

Sobeys Inc. v. Mills, [2000] N.S.J. No. 244, August 4, 2000

HR Compliance Insider Preferred Subscriber Offer

Yes, please enter my new one-year subscription to HR Compliance Insider at the special rate of just \$397 plus shipping and handling. The Insider gives me plain language, "how-to" help to comply with HR laws and avoid liability. If not completely satisfied, I may cancel and receive a full refund on the unused balance of my subscription. Discount Code 2380

Name _____ Title _____ Company _____

Address _____ City _____ State/Province _____

Zip/Postal Code _____ Email _____ Phone _____

Mail to: Bongarde, #102-501 Main Street, Penticton, B.C. V2A 9A6 or Bongarde, Box 428-103 Eastside Oroville Rd., Oroville, WA 98844
Phone: 1-800-667-9300 Fax: 1-888-493-1970