

HR Compliance

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

INSIDER

Volume 7 Issue 11

PERFORMANCE REVIEWS

5 Traps to Avoid

THIS STORY WILL HELP YOU

Use performance reviews to help employees improve—or lawfully fire them if they don't

Performance reviews don't simply provide employees the feedback they need to do their job better; they protect your organization from liability by documenting decisions to terminate employees on the basis of poor performance. At least that's the theory. In actual lawsuits, the performance review often works to the *employee's* advantage. Here's why and how to ensure that your own employees don't use their performance reviews as Exhibit A in a wrongful dismissal case against your organization.

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ACCOMMODATING DISABILITIES

Do Your Emergency Response Plans Provide for Disabled Employees?

THIS STORY WILL HELP YOU



Meet your legal obligation to protect disabled employees from workplace emergencies



Hurricanes, floods, wild fires and other recent disasters serve as a reminder that employers are required to develop an emergency response plan for their workplace. And while emergency response requirements have been around for a while, the new accessibility laws springing up in Ontario and other provinces add emphasis to a key point: Emergency response plans must account for the needs of employees with hearing, visual, mobility and other disabilities that impair their ability to evacuate in an emergency. And if you're in Ontario, you're facing a Jan. 1 deadline to meet this requirement.

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PERFORMANCE REVIEWS CONTINUED FROM FRONT

The Problems with Performance Reviews

An employee's failure to perform up to standard is clearly just cause for termination. But once you move beyond principles, you face the formidable task of persuading a sceptical judge that you were justified to fire one of your own employees for poor performance. A 2001 Manitoba case called *Boulet v. Federated Co-operatives* ([2001] M.J. 306), establishes the 4 things you must prove to show poor performance as just cause to terminate:

-  You established a reasonable and objective performance standard and clearly communicated it to the employee;
-  You gave the employee a fair chance to meet the standard;
-  The employee was incapable of meeting the standard; and
-  You provided clear warning that failure to meet the standard would result in dismissal.

The performance review is documentation that can help you prove compliance with the *Boulet* factors. It can also help show that termination was based on merit rather than age, sex or other personal characteristic protected by discrimination laws. But does it work? There's an emerging school of thought that performance reviews actually increase employer liability risks. To test the theory, the *Insider* compiled all reported court cases from Canada in the past 10 years in which performance reviews were cited as evidence in a wrongful termination suit. Findings:

Total Cases	Cases Where Performance Review Helped Employer Win	Cases Where Performance Review Helped Employee Win
76	17	59

Although this "study" isn't scientific and doesn't include arbitration or labour boards, it supports the view that performance reviews are doing more to hurt than help employers' efforts to justify termination for poor performance.

5 PERFORMANCE REVIEW TRAPS TO AVOID

Based on the cases, there are 5 kinds of performance review traps employers fall into:

Trap 1. Inconsistent Use of Performance Reviews

As with other HR management practices, inconsistent use of performance reviews is a lightning rod for liability.

Example: No just cause to fire an accountant for performance where the decision was made before her highly negative performance review. Suggesting that performance was a pretext, the court noted that it was the accountant's first review in 13 years on the job and took place just before a scheduled salary raise was about to kick in [*Black v. Robinson Group Ltd.*, [2002] O.J. No. 4011, Oct. 18, 2002].

Example: By contrast, denying promotion to border guard with excellent performance reviews was legit because the agency followed a consistent and transparent process of filling positions based on merit via open competition where internal performance reviews weren't considered so as not to give agency employees an unfair advantage over outside applicants [*Hughes v. Canada (Attorney General)*, [2009] F.C.J. No. 765, June 8, 2009].

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Trap 2: Not Giving Clear Enough Warning

A negative performance review isn't enough to prove the fair warning of termination required by *Boulet*; you need to spell out that termination will be the consequence of continued poor performance.

Example: Negative performance review telling collection agent to be careful and that company will be watching him wasn't fair warning because it didn't expressly say his job was in jeopardy and that he'd be fired immediately if he didn't improve [*Fanous v. Total Credit Recovery Ltd.*, [2006] O.J. No. 3036, April 11, 2006].

Even an explicit warning may be compromised if it's accompanied by a positive or blame-deflecting message that creates a mixed signal.

Example: Performance review expressly listing radio station manager's shortcomings—lack of attention to detail, low energy and poor people management—and warning him to get it together or else wasn't fair warning because it also contained statements praising his performance and absolving him of blame for station's problems [*Schutte v. Radio CJVR Ltd.*, [2007] S.J. No. 714, Dec. 19, 2007 (case overturned by Court of Appeal on other grounds 2 years later, [2009] S.J. No. 496)].

Trap 3: Abusive or Unfair Review Processes

Getting a lousy performance review is upsetting. But holding employers liable for delivering a negative performance review seems a bit much. Still, it's been tried. There are 2 theories you need to be aware of:

Constructive Dismissal: One theory is that negative performance reviews poison the work environment and constitute grounds for constructive dismissal. The leading case comes from Ontario and stands for the rule that negative performance reviews are okay as long as the criticism is reasonable and made in good faith. "Criticism may not be agreeable, but it is necessary," said the court [*Ata-Ayi v. Pepsi Bottling Group (Canada) Co.*, [2006] O.J. No. 4440].

Infliction of Mental Distress: The second theory is infliction of mental distress. The good news is that at least so far, the courts haven't bought into this. Again, Ontario has been the main battleground. A series of cases from that province have ruled that employees can't sue their employers for negligent infliction of mental distress for "conduct in the course of employment." (The most recent case is *Piresferreira v. Ayotte*, [2010] O.J. No. 2224, May 28, 2010).

The bottom line: As long as your methods are fair, consistent and constructive, you're allowed to give employees negative performance reviews.

Trap 4: Firing Employees for Poor Performance after Positive Reviews

Be aware that performance review SNAFUs come not just from what you say in the performance review but inconsistency between what you say and how you treat the employee. The most common pitfall is lowering

the boom on employees after giving them positive reviews. Such was the scenario in 37 of the 59 court wrongful dismissal cases we found where performance reviews were cited as evidence in an employee's favour.

Example: No just cause to office manager for incompetence where 4 years of positive performance reviews demonstrate that company was satisfied with his performance [*Van Aggelen v. I.C.C. Liquid Gas Ltd.*, [1988] B.C.J. No. 2066, Nov. 9, 1988].

Firing employees after awarding them raises, bonuses and other performance also undermines the credibility of the argument that an employee was fired for poor performance. Some courts consider this conduct a form of double crossing that opens the door to extra termination notice, *Wallace* and even punitive damages for carrying out the termination in bad faith.

Trap 5: Not Following Up a Negative Performance Review

Another variation on the watch-what-employers-do-not-what-they-say-in-the-performance-review theme is not following up with employees to correct the performance problems you raise. Over time, toleration of inadequacies becomes condonation and precludes the possibility of putting your foot down and demanding that employees improve.

Example: A company that waited 27 months to investigate alleged long distance phone abuses by an officer manager—and giving him positive performance reviews in the interim—had condoned any breaches and had no just cause to terminate for dishonesty [*Lambe v. Irving Oil Ltd.*, [2002] N.J. No. 316, Nov. 29, 2002].

WHAT TO DO

In deciding on next steps, remember that performance review isn't a document but a process. At least it should be. The point of the process is to help employees improve and, establish the legal basis for dismissal (in accordance with the *Boulet* factors described above) if they don't. To the extent performance reviews aren't fulfilling these objectives, you may be able to solve the problem by adopting a so-called Performance Improvement Plan (PIP) for employees who get lousy performance reviews and need to improve to avoid termination. Based on Best Practices, a PIP should do 6 things:

1. Identify the Performance Problem

The Law Requires: To fire for poor performance, you must let employees know exactly what they're doing wrong.

PIP Strategy: The PIP should include a "deficiency statement" that describes the employee's performance problem(s) as specifically as possible (Model, para. A).

PERFORMANCE REVIEWS CONTINUED FROM FROM PAGE 3

2. Explain the Skills that Need Improvement

The Law Requires: You must give employees a fair chance to improve before firing them for poor performance.

PIP Strategy: List the skills, duties and behaviours the employee needs to improve to fix the performance problem (Model, para. B).

3. Identify Performance Standards

The Law Requires: You can't fire employees for poor performance unless you establish and clearly communicate an objective and reasonable performance standard.

PIP Strategy: Describe the expectations of how the job should be done and what acceptable performance looks like. Make sure these standards are reasonable, measurable and consistent with what's expected of employees with comparable roles and skills (Model, para. C).

4. Describe Action Steps

The Law Requires: You must give employees a fair chance to live up to your expectations and support their efforts.

PIP Strategy: List the steps the employee must take to achieve the performance goal and a timetable, and what supervisors or management

will do to support the employee and help her achieve the performance goals (Model, para. D).

5. Establish Schedule to Measure Progress


Create a schedule for reviewing the employee's performance and progress (Model, para. E).

6. Explain What Happens If the Employee Doesn't Improve

The Law Requires: To terminate for poor performance, you must clearly warn employees their job is in jeopardy and that they'll be terminated if they don't improve.

PIP Strategy: Describe the consequences if the employee doesn't live up to the PIP goals. If termination is the next step, specifically say so (Model, para. F).

Conclusion

Abolishing performance reviews because they create liability risks is like abolishing donuts because they cause obesity. Liability risks stem not from use but misuse of the performance review. As long as you understand the risks, you should be able to manage them. The other key takeaway from this story is how coupling performance review with PIPs helps get poor performers back on track or, at the very least, sets the stage for lawful dismissal if improvement efforts fail. 

MODEL PERFORMANCE IMPROVEMENT PROGRAM

Here's a Model PIP based on the example of a billing account manager that makes too many errors.

To: Jane Roe

From: ABC Company

Date: Nov. 15, 2011

Re: *Performance Improvement Program*

Dear Ms. Roe:

- A. Over the past 3 months, the ABC Company auditing system has detected errors in 12 of the 65 billing invoices you prepared. Had they not been detected, the 12 billing errors made would have resulted in at least \$75,000 in overbillings to ABC Company clients.
- B. All 12 of the billing errors detected occurred in Schedule A of the Invoice Form. This suggests that the problem might be the result of inadequacy in *[describe competency, e.g., your knowledge and skills in calculating accounts payable in accordance with generally accepted accounting principles on XYZ technology systems.]*
- C. ABC Company's expectations is that you perform in accordance with the standards that apply to a billing clerk who possesses proficient skills in calculating accounts payable, i.e., that you make no more than 1 error in every 50 invoices processed, an error rate of 2% per month.
- D. ABC Company expects you to enroll and successfully complete a 3-week Accounts Payable Processing course with JHI Institute on December 1 to achieve recertification as a licensed AP accountant. In addition, for the months of December and January, you will work closely with your supervisor in completing Schedule A of all Invoice Forms before submitting them to the ABC Company billing department for processing.
- E. Starting December 1, you will meet with your supervisor once a week to review your progress in achieving the goals of this Performance Improvement Plan (Plan). At the end of each meeting, you will receive a written report outlining what was discussed, the progress you've achieved, the obstacles you're confronting, what you need to work on and any modifications made to the Plan.
- F. Failure to complete the re-certification and other goals set out in this Plan within the required timetable will result in the termination of your employment by ABC Company.



HR MONTH IN REVIEW

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

CASE OF THE MONTH

BC Court Draws a Line on Accommodating Disabled Employees

Rule 1: Employers must accommodate disabled employees to the point of undue hardship

To determine what accommodations are appropriate, employers often have to engage the employee in an accommodation process. And that leads us to:

Rule 2: Employers must treat employees fairly and with respect during the accommodation process.

Rule 1 is written into the human rights law. Rule 2 is implied from Rule 1. But is Rule 2 a real rule or just a theory? A recent BC case provides at least a preliminary answer to this fascinating and potentially far-reaching question. (*Hint:* The answer is no.)

THE CASE

What Happened: A health service wouldn't let an employee work as a primary care paramedic (PCP) because multiple sclerosis decreased sensation in his fingertips and left him unable to "palpate a pulse." The BC Human Rights Tribunal agreed that being able to feel a pulse was a bona fide occupational requirement (BFOR) for a paramedic. But it ordered the service to pay the employee \$35,000 in damages for violating the "procedural aspect" of its accommodation duty. The service failed to treat the paramedic "with dignity and respect" during the accommodation process because it took too long to let him work in an alternative position as a driver, said the Tribunal.

What the Court Decided: The BC Supreme Court said that the Tribunal's decision was wrong and reversed it.

How the Court Justified Its Decision: The Tribunal's ruling that the service violated the procedural aspect of its duty to accommodation

was incorrect. Although it's okay for courts to look at how the employer conducted itself during the accommodation process to determine if it met its accommodation duty (Rule 1), there is no such thing as a procedural duty to treat employees with dignity and respect during the accommodation process (Rule 2). The only questions in this case were whether the need to take a pulse was a BFOR for a PCP and whether the service had to accommodate the paramedic by letting him work as a driver, the court concluded.

Emergency Health Services Commission v. Cassidy, [2011] BCSC 1003 (CanLII), July 26, 2011

ANALYSIS

As a matter of law, the significance of *Cassidy* is that it lays to rest the theory that the duty to accommodate has a "procedural aspect." Failure to treat employees with dignity and respect in the accommodation process may be *evidence* that the employer didn't meet its substantive duty to accommodate. But in the end, accommodation is about the substance of the accommodation not the process in which it's forged. Rule 1 is real, Rule isn't.

The practical impact of *Cassidy*—especially for BC employers—is disaster averted. The duty to make accommodations is onerous enough. Throwing an additional procedural duty into the mix would have complicated matters and spawned even more accommodation litigation.

But caveats apply. First of all, *Cassidy* is a BC case. And it comes not from the Court of Appeal but lower Supreme Court. So an appeal isn't out of the question. If you're not from BC, you can hope that *Cassidy* prevents employees, unions and trial lawyers from asserting "procedural accommodation" claims in your jurisdiction. Of course, that's hardly a sure thing, especially if the case does get appealed to the BC Court of Appeal.

The bottom line: No matter what part of Canada you're in, *Cassidy* and its potential procedural accommodation progeny will bear close watching in the months to come.

LAWS & ANNOUNCEMENTS

Health Care

Aug. 25: Ottawa has officially agreed to keep the Territorial Health System Sustainability Initiative aid flowing through at least March 31, 2014. Nunavut and its territorial neighbours will split \$30 million per year for health system initiatives—both local and pan-territorial. THSSI funding is designed to help the territories meet the challenge of delivering medical care to small populations scattered over enormous distances.

LAWS & ANNOUNCEMENTS

Employment Standards

Oct. 1: The bill, Bill 21, providing unpaid leave for employees called up for duty in the military reserve force received Royal Assent and will take effect today. To qualify, employees must have worked for the employer for 6 consecutive months and furnish written notice of leave within 4 weeks or "at the earliest reasonable opportunity."

LAWS & ANNOUNCEMENTS**Employment Insurance**

Aug. 19: HRSDC announced a series of measures to modernize EI delivery. The goal is to expand electronic processing from current 44% to 77% of EI claims over the next 3 years and consolidate processing centers from 120 to 22 sites.

Pensions—Risk Management

Aug. 31: A new guideline sets out OSFI's expectations on DB plan use of stress testing, a risk management technique involving simulation of disaster scenarios to determine a plan's ability to withstand financial adversity. The guideline explains when and how plans should use stress-testing and what to test for.

Pensions—Consent

Aug. 26: Another revised OSFI guideline sets out ground rules for consent benefits, i.e., benefits paid to members at the plan administrator's discretion. Plans better be darn clear about which benefits are subject to consent; and administrators best be aware of their fiduciary duties when exercising their discretion. Consent benefits must also be reflected in the plan's actuarial valuation, says OSFI.

CASES**Maternity Leave Top Up ≠ EI Insurable Earnings**

EI denied benefits to a nurse whose job was eliminated while she was on maternity leave for lack of insurable earnings. She claimed that her maternity leave top up and lump sum payment counted as insurable earnings. But the court wasn't buying what she was selling. A court did, in fact, count top ups as insurable earnings in 2003; but right after the ruling, the EI regulations were changed to exclude top ups. As for the lump sum, it was a retiring allowance and didn't count as insurable earnings [*Geddes v. Canada (Minister of National Revenue)*, [2011] T.C.J. No. 296, Aug. 8, 2011].

Employer Can't Rely on Previous Case to Stop Work Refusal

In 2007, stevedores refused to load grain through cement loading holes of cargo hatches in inclement weather. The company investigated and brought in an outside expert to develop safe work procedures for the operation. Stevedores then engaged in a similar refusal during a 2010 storm. We've been down this road before, claimed the company. Just follow the procedure. But the Tribunal disagreed. Although the previous case was relevant, the health and safety officer had to treat this as a new situation and investigate [*DP World (Canada) Inc. v. Int'l Longshore & Warehouse Union, Local 500*, 2011 OHSTC 17, Aug. 9, 2011].

LAWS & ANNOUNCEMENTS**Minimum Wage**

Sept. 1: Minimum wage changes take effect:

- ✦ 60¢ increase in minimum wage to \$9.40
- ✦ New minimum wage for liquor servers earning tips—starts at \$9.05 and then fixed at \$1 less than regular minimum wage once latter hits \$10.05
- ✦ Future increases in minimum wage based on average of annual weekly earnings and CPI.

Employment Standards

Aug. 10: ESC claims are up 20% this year—to 6,400—largely due to the online complaint process that began last year. And now the government is planning to crack the whip on ESC enforcement by hiring 6 new Employment Standards officers and more third party auditors to review wage, overtime, maternity leave, vacation pay and other ESC claims.

CASES**Court Nixes Non-Compete and Non-Solicitation Clauses**

A foreign exchange company was thwarted in its attempt to enforce non-compete and non-solicitation clauses against 3 ex-employees. In one case, the termination was wrongful so the restrictive covenants it contained were unenforceable. In the other 2 cases, the clauses were overbroad, too vague and imposed on the employees without consideration, i.e., something of value in return [*Globex Foreign Exchange Corp. v. Kelcher*, [2011] A.J. No. 881, Aug. 10, 2011].

HR Use of Medical Information for Discipline Violates Privacy

An employee's addiction counsellor turned over all notes from their session to his employer's HR department, which then proceeded to suspend the employee based on the information. The Privacy Commissioner found the employer guilty of a privacy violation. Although the employee had signed a consent form, his consent was limited to collection, use and disclosure of health information for treatment, not for conducting an HR investigation [*Office of Info. & Privacy Comm.*, Order H2011-001, July 29, 2011].

Work Injury Is Employee's Fault

OHS charges against an auto service company in a tire explosion were dismissed because the court found that the company had used due diligence by providing appropriate training, restraints, hands-on supervision and clearly communicated safety rules. The victim was an experienced technician who purposely failed to use required safety restraints when inflating a tire on a split rim wheel assembly despite warnings from a co-worker. It was unforeseeable that the victim would act so "irrationally," said the court [*R v. Fountain Tire (Olds) Ltd.*, [2011] ABPC 236 (CanLII), July 18, 2011].

LAWS & ANNOUNCEMENTS**Workers' Compensation**

Sept. 1: The average premium rate for 2012 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.

Business Development

Aug. 16: Nova Scotia renewed its participation in the Canada/Atlantic Provinces Agreement on International Business Development for another 5 years. The IBDA supports and promotes cooperation and investment in new businesses across NS, NB, NL and PE.

CASES**OK for Employer to Unilaterally Change Longstanding Scheduling Practice**

During collective agreement negotiations, a nursing home operator notified the union of its intention to change a scheduling practice it had followed for at least 4 years. The arbitrator said okay. Nothing in the collective agreement banned the change. And the operator wasn't "estopped," i.e., barred from changing a longstanding practice that the union has reasonably relied on without its consent. The scheduling practice was longstanding and the union did count on it to continue, the arbitrator admitted. But the employer had made its intentions to change it clear. So, instead of relying on the operator to continue the practice, the union should have dealt with the issue during the collective agreement negotiations taking place at the time [*Resi-Care Cape Breton Assn. v. CUPE, Local 3008A (Scheduling Practice Grievance)*, [2011] N.S.L.A.A. No. 5, Aug. 3, 2011].

LAWS & ANNOUNCEMENTS**Workplace Violence**

Sept. 1: Employers now have to issue annual reports on violent incidents in the workplace in the past year if they've determined there's a risk of violence or are in healthcare or other designated industry. Employers must also develop policies on how employees can get immediate help if they're threatened. The OHS law changes also make it clear that companies can disclose personal information to employees to warn them about risks of violence by co-workers.

**FEDERAL****ALBERTA****NOVA SCOTIA****MANITOBA**



BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS**Temporary Foreign Workers**

Aug. 15: Under a new pilot program, spouses, common law partners and dependent kids of TFWs can apply for open work permits allowing them to take a job with any employer in the province. Under current rules, only spouses and common law partners of TFWs in managerial, professional or skilled trades qualify for open work permits.

Pensions

Aug.: The Superintendent's revised pensions bulletin (PENS-11-002) explains the criteria it uses to approve solvency funding payments to DB plans for "extenuating reasons":

- ✦ Extension must be in plan members' best interests
- ✦ Solvency deficiency must be due to factors beyond plan's control
- ✦ Actuarial valuations must be reasonable
- ✦ Plan must have realistic funding policy
- ✦ Plan must offer strong assurance of viability over extension period
- ✦ Plan must be in good standing on its fees and registration paperwork.

Collective Bargaining

Aug. 15: The government reached a tentative agreement with roughly 14,000 social service workers. As usual in BC, terms weren't disclosed.

CASES**Protection against Sex Harassment Doesn't Cover Non-Employee**

A truck driver claimed she was sexually harassed by employees of a client company while unloading recyclables at its site. So she sued the client company. The Human Rights Tribunal said she didn't have a valid claim for employment discrimination and threw out her case. The client was a separate company that wasn't her employer and had no control over her employment, it reasoned [*Jones v. Cascades Recovery*, [2011] B.C.H.R.T.D. No. 202, Aug. 3, 2011].

Throwing Wood at Co-Worker Warrants Suspension Not Termination

An employee got fired for hurling a heavy piece of wood at a co-worker, hitting him in the legs during an argument. The arbitrator ordered him reinstated. Throwing wood at a co-worker is discipline-worthy, especially when the co-worker is operating heavy machinery. But the employee didn't have a history of violence and acknowledged the seriousness of his misconduct. So a "significant suspension" was enough [*BC Door Co. v. United Steel, Paper and Forestry, Rubber, Manufacturing Energy Allied Industrial and Services Workers International Union, Local 1-1937 (Boston Grievance)*, [2011] B.C.C.A.A.A. No. 99, July 28, 2011].



SASKATCHEWAN

LAWS & ANNOUNCEMENTS**Minimum Wage**

Sept. 1: The minimum wage increased 25¢ to \$9.50 per hour. 25¢ represents a 2.7% increase. And 2.7% is an average of the 1.4% rise in the CPI and 4.0% increase in the Average Hourly Wage.

Whistleblowers

Sept. 1: The new *Public Interest Disclosure Act* (previously known as Bill 147) took effect and protects public employees from retaliation for reporting wrongdoing by their agencies. The law also requires agencies to establish procedures for making disclosures and investigation alleged acts of retaliation.

Human Rights

Aug. 11: According to the Human Rights Commission's 2010 Annual Report, there were 185 discrimination complaints in 2010, 76% of which were employment-related. The top 4 grounds of complaint:

- ✦ Mental or physical disability: 35.6%
- ✦ Ancestry: 29.5%
- ✦ Sex/gender: 19.9% (most of them pregnancy-related)
- ✦ Age: 5.4%.

Pensions—Unlocking

Aug. 16: The Financial Services Commission issued a Policy Bulletin on unlocking clarifying the grounds for getting immediate access to pension assets without tax penalties, including for small benefit withdrawals, shortened life expectancy and enforcement of child support and other family maintenance orders.

Pensions—Funding

Aug. 16: Another Policy Bulletin on funding margins clarifies the Superintendent's expectations for margins, i.e., acceptable ranges of deviations from funding and valuation levels.

CASES**Union Can Fine Member for Crossing Picket Lines during Strike**

The SGEU fined one of its members for crossing picket lines during a strike. The member admitted working through the strike but claimed she wasn't a union member at the time because she was on temporary assignment to an out-of-scope position. But the court disagreed. Although the union constitution didn't address the issue, it was clear to everyone, including the member, that she was in the union at the time of the strike. She continued to pay her dues and LTD benefits through the strike and shared in the gains won by the strike. So she had to pay the \$6,964 fines (net earnings during the strike) [*Sask. Government & General Employee's Union v. Gossner*, [2011] S.J. No. 517, Aug. 26, 2011].



NB

LAWS & ANNOUNCEMENTS**Minimum Wage**

Sept. 1: The 50 cent increase in the minimum wage to \$10 per hour has been pushed back from Sept. 1 to April 1, 2012. In addition to giving businesses more time to adjust, the Minister claims the 7-month delay is needed to enable the government to study moving to a two-tiered minimum wage.

Pensions

Aug. 23: The Superintendent of Pensions warned about a scam making its way across the province that offers pension plan members an opportunity to sell all or part of their future benefits for a lump sum cash payment. These arrangements, which tout no upfront fees or closing costs, violate unlocking restrictions and could result in severe tax penalties to anybody who falls for them.

Public Pensions

Aug. 23: New Brunswick public service, teachers' and judges' pension plans had an impressive 10.42% gross (i.e., not adjusted for inflation) return in 2010-2011. The New Brunswick Investment Management Corporation that runs the plan funds has achieved a 6.75% long-term annualized return since its formation back in 1996—not too shabby given all the turmoil in the financial markets in recent years.

CASES**Court Refuses to Bar Orthodontist from Opening Competing Practice**

A Fredericton orthodontist asked a court to order his former employee not to open her own practice in the city and solicit his patients. But the court refused. Although they had negotiated the issue, the sides had never made a written non-compete agreement; nor was there any implied non-compete since the employee didn't owe the orthodontist a fiduciary duty. And there was no evidence that she had taken any confidential information [*Dr. Robert Hathaway Prof. Corp. v. Instrum*, [2011] N.B.J. No. 256, Aug. 9, 2011].



NL

LAWS & ANNOUNCEMENTS**Prescription Drugs**

Aug. 25: A new regulation requires pharmacies participating in the Newfoundland and Labrador Prescription Drug Program to provide 120 days' notice before pulling out of the program. The action is in response to recent actions by independent pharmacies throughout the province in announcing their intention to quit the NLPDP.

CASES**Enough Scientific Evidence to Rule Cancer Is Work-Related**

Workers' comp denied the claim of a fuel truck driver for non-Hodgkin's lymphoma for lack of scientific evidence linking the illness to exposure to solvents at work. But the review commissioner reversed, citing studies indicating "statistically significant associations" between non-Hodgkin's lymphoma and solvent exposure. The appeals court upheld the decision as reasonable. It's wrong to reject a claim just because the data hasn't established the link to a "scientific certainty," it reasoned [*Iron Ore Company of Canada v. Newfoundland (WHSCC Review Div.)*, [2011] NLTD 103 (CanLII), July 21, 2011].

LAWS & ANNOUNCEMENTS

Return-to-Work

July 25: For a free *Insider* Special Report on the WSIB's new Work Re-Integration program, see www.hrcomplianceinsider.com.

Human Rights

Aug. 12: First, it was OHS; next came workers' comp; and now the human rights law is undergoing top-to-bottom review. Playing the role of Tony Dean/Harry Arthurs is human rights lawyer Andrew Pinto. Public consultations will be held and a report issued in the spring, assuming the October election doesn't knock the process off track.

Employment Standards

Sept. 1: The McGuinty government is fixing to introduce a bill extending family medical leave. In addition to the 8 weeks of unpaid family medical leave to care for loved ones with terminal illnesses provided by current ESA law, the bill would grant 8 more weeks of caregiver leave to employees so they can take care of family members with serious injuries or illnesses including cancer and stroke. We'll keep you apprised.

Pensions

Aug. 9: FSCO issued a new bulletin on Annual Information Returns and Pension Assessments. A500-401 discusses the new paper and electronic filing options, procedures and deadlines and clarifies that AIRs must be filed on full wind up and that the pension assessment fee has replaced the AIR filing fee.

CASES

Arbitrator Upholds Discipline against Careless Train Operator

A Toronto Transit operator was demoted and banned from driving TTC vehicles for 5 years after driving a 4-car train through the closed garage door of the carhouse. The arbitrator refused to lighten the penalty, noting that the operator had been suspended 3 times in 2 years for careless operation of subway trains in the yard. This recent incident violated several TTC safety policies and the fact that its consequences were limited to a shattered garage door was "sheer luck." The operator was lucky to still have a job, said the arbitrator [*Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Campbell Grievance)*, [2011] O.L.A.A. No. 362, Aug. 9, 2011].

OK to Fire Employee for Acting Like a Jackass

Inspired by the TV series *Jackass*, construction workers engaged in an I-dare-you contest culminating with the baring and stapling of genitals in the lunchroom. Of course, all of the antics were caught on video and posted on YouTube where they became an industry sensation. Not so amused was the company which fired the genital bearing worker for violating harassment policy. The OLRB upheld the firing. Even though it was his first offence, the worker deserved to be sacked for "demonstrating [such] stupidity" [*Int'l Union of Elevator Constructors, Local 50 v. Thyssen Krupp Elevator (Canada) Ltd.*, [2011] CanLII 46582 (ON LRB), July 28, 2011].

Discipline ≠ Reprisal Because It Occurs Before Safety Complaint

An employee claimed he was disciplined in reprisal for raising safety concerns about the company's general operations and supervisors. The OLRB dismissed his complaint. All of the disciplinary actions the employee cited took place before he registered his safety complaints. So the discipline couldn't have been a reprisal [*Dubuc v. Ontario (Community Safety & Correctional Services)*, [2011] CanLII 46615 (ON LRB), July 29, 2011].

OK to Lay Off Worker Returning from Medical Leave

An employee was laid off just as he was getting set to return from a lengthy medical leave. The Human Rights Tribunal dismissed his disability discrimination claim. The employee was laid off for financial reasons, not because he was disabled. The bad economy and loss of 2 key clients had forced the company to downsize, said the Tribunal, citing the layoff of 3 others and the cutting of senior managers' salaries [*Munroe v. Padulo Integrated Inc.*, [2011] HRTO 1410 (CanLII), July 27, 2011].

Employer Must Go to Trial for Not Protecting Employees against Abusive Blogs

Correctional officers made highly offensive remarks about their bosses in their personal blogs. The bosses claimed harassment and the Grievance Board refused to dismiss the case. The argument that the blog contents created a poisoned work environment that the employer was required to address had enough legal validity to go to trial, the Board concluded [*Lee v. Ontario (Ministry of Community Safety and Correctional Services)*, [2011] O.P.S.G.B.A. No. 11, July 21, 2011].

LAWS & ANNOUNCEMENTS

Business Development

Aug. 23: Island businesses can secure equity financing and a 35% personal income tax credit for development ventures under a new government program called the CEDB (Community Economic Development Business). See www.gov.pe.ca/cedb.

Workers' Compensation—Claims

Sept. 1: In case you missed it, the WCB revised a couple of claims policies this summer. Policies affected:

- ✦ Benefit of Doubt (POL-62): Where evidence for and against claim is equal, claimant gets benefit of doubt
- ✦ Emergency Callout of Workers (POL-127): Clarifies whether injuries to workers called out for emergencies after work hours and/or at locations other than workplace are work-related.

Workers' Compensation—Registration

Sept. 1: The WCB revised its policy, Employer Registration (POL-19), which covers:

- ✦ Employers required to register for workers' comp
- ✦ Registration procedures
- ✦ How WCB estimates an employer's assessable payroll
- ✦ Coverage of proprietors, partners, directors and officers.

Workers' Compensation—Trucking

Sept. 1: The final WCB policy change is to Interjurisdictional Trucking—Alternative Assessment (POL-142), and affects the voluntary alternative procedure used to determine assessable payroll of employers with trucking operations in PE and other provinces.

LAWS & ANNOUNCEMENTS

Labour Market

Aug. 30: Québec won't achieve significant growth in wealth until it fixes the structural weaknesses in its economy that make labour costs so much higher than other provinces. Such is the conclusion of a report from the province's second biggest employer council, Conseil du Patronat. Among the 4 biggest provinces, Québec has the highest payroll taxes, minimum wage in relation to median wage and high school dropout rate, the report notes.

CASES

Does Union Representation Extend to Non-Union Employees after Merger?

Four credit unions (let's call them "banks") merged. Only 2 of them were unionized. Their union contended that its certification should extend to the employees of the non-union banks. The employer argued for a secret ballot so the employees could decide for themselves. The CRT sided with the union. All employees of the newly merged entity should be part of the same certification unit, especially given that the collective agreement was about to expire and that all union questions could be dealt with during the new negotiations [*Syndicat des employés et employés professionnelles et de bureau, locale 575 c. Caisse Desjardins Pierre Le Gardeur*, [2011] QCRT 313 (CanLII), June 30, 2011].

LAWS & ANNOUNCEMENTS

Workers' Compensation

Aug. 25: Workers' comp rates are going down for *all* employers. The average assessment rate is dropping a full 10¢ to \$2.39 per \$100. Premium cuts will range from 5% to 22% depending on industry. The reason? Injuries are down, return-to-work outcomes are improving and, unlike some workers' comp boards (which shall remain nameless), the YWCHSB has its financial house in order.

What the Law Requires

The OHS laws of each jurisdiction require employers to prepare for workplace emergencies by conducting a hazard assessment, developing response plans for evacuation or sheltering in-place and training employees to carry out their roles in the plan. But only 4 jurisdictions specifically address the needs of disabled employees in their OHS regulations.

Jurisd.	OHS Emergency Preparedness Obligations of Employers Re: Disabled
Fed	<ul style="list-style-type: none"> • Provide training, instruction and information including warning signs and signals in “alternative media” for employees with “special needs,” e.g., Braille for visually impaired • Emergency evacuation plans of buildings with 50 or more employees must address needs of employees requiring special assistance
BC	<ul style="list-style-type: none"> • Employee must notify employers of impairments that hamper their ability to carry out response roles and not be assigned such responsibilities • Rescue plans for employees who need physical help to be moved
NL	<ul style="list-style-type: none"> • Rescue plans for employees who need physical help to be moved
SK	<ul style="list-style-type: none"> • Fire safety plan must provide for evacuating the disabled

Arguably, equivalent duties apply in other jurisdictions under the “general duty” clause of the OHS act (that requires employers to protect employees against foreseeable safety hazards). The duty to extend emergency preparations to the disabled is also implied as part of an employer’s obligation to accommodate the disabled under human rights laws.

But the new workplace accessibility laws in Ontario say directly what these OHS and human rights laws only imply: Emergency plans must account for the needs of disabled employees. The Integrated Accessibility Standards regulation under the *Accessibility for Ontarians with Disabilities Act, 2005* which took effect on July 1, 2011, requires employers to develop individual accommodation plans for each disabled employee. The first concrete measure employers must take is to provide disabled employees *individualized* emergency response information, effective Jan. 1, 2012.

Manitoba has adopted similar legislation and other provinces are expected to do likewise. So, no matter where you’re from, you must ensure that your emergency response plan adequately addresses the special needs of employees with disabilities. With that in mind, we had our super-correspondent, Sheryl Smolkin, sit down for a one-on-one with Alf Spencer, the Director of Outreach and Compliance for the Accessibility Directorate of Ontario, to discuss the new accessibility requirements and what employers should do to comply with them.

THE ACCESSIBILITY REGULATION

Q: Which organizations do the new rules cover?

A: Any organization in Ontario that has one or more employee. We estimate that 360,000+ organizations will be affected, including 48,000 not-for-profits.

Q: What’s the deadline for compliance?

A: The first standard, covering customer service has already taken effect (for the public sector). The employment accessibility standards will take effect in stages through 2021.

COMPLIANCE STRATEGY—START WITH EMERGENCY RESPONSE

Q: There are so many parts to the regulation. How do employers prioritize? What should they do first?

A: We’ll be releasing a roll-out strategy explaining the requirements that apply to each particular type of employer and when they take effect. But the starting point will be workplace emergency response information since that’s the first requirement to take effect—on Jan. 1, 2012.

WHICH EMPLOYEES NEED SPECIALIZED INFORMATION

Q: What does the emergency response rule require?

A: It requires employers to provide each disabled employee individualized emergency response information based on his or her special needs.

Q: What if an employer doesn’t know an employee has a disability?

A: That’s an interesting question. Clearly, you must provide the information to any employee that has an apparent disability, like mobility impairment and blindness, as well as to any employee who notifies you that they have a disability that isn’t immediately apparent like a learning disability or mental illness. The tricky part is what to do about employees whose disabilities aren’t apparent and who don’t tell you they’re disabled. What you might want to do is provide general notice to all employees letting them know of their rights to individualized emergency response information and asking them to come forward for help if they need it.

WHAT INFORMATION TO PROVIDE

Q: Exactly what emergency response information should employers provide?

A: The Ministry (of Community and Social Services) is working on guidelines to help employers develop policies and practices, the way we did with the customer service standards. We’ll post all of this free material on a website, [www. AccessON.ca](http://www.AccessON.ca).

WORK EMERGENCIES & THE DISABLED CONTINUED FROM FROM PAGE

Q: In the meantime, can you offer some concrete examples?

A: Sure. Suppose your office is on the upper floor of an office tower. Your fire evacuation plan requires use of the stairs. You're going to need to provide information telling an employee in a wheelchair how she'll be evacuated, e.g., by assigning rescue wardens to carry her down the stairs. Or, to use another example, if an employee is deaf, how are you going to make sure he knows when the fire alarm goes off?

PROTECTING THE EMPLOYEE'S PRIVACY

Q: Who in the organization is entitled to this information?

A: That's a very good question. The standard requires providing the information either directly to the employee or to a person the employer designates to assist him (subject to the employee's consent). The employer, employee and possibly the manager would be entitled to the information. Furnishing access to others would have to respect the employee's confidentiality—for example, she might not want others in the organization to know she has a mental disability.

Q: So the rule of thumb is to disclose on a strictly as-needed basis to third parties?

A: Right. And disclose only the information the third party needs to protect the employee. So, for example, question what, if any, details rescue wardens assigned to carry a mentally disabled employee to safety need to know about the employee's condition to perform their role.




REVIEW & RECORDKEEPING

Q: Do employers have to file the individualized workplace emergency response information anywhere?

A: That's something the employer and employee will have to agree on based on privacy considerations.

Q: What happens next?

A: I'm glad you asked. The standard requires that employers review individualized emergency response information it provides to an employee when:

-  The employee moves to a different work location;
-  The employee's individual accommodation plan changes; or
-  It conducts a general review of its emergency response policies and procedures.

PENALTIES


Q: What are the penalties for non-compliance?

A: The maximum fine is \$50,000 per day for a serious offence. Although the fines and penalties policies still need to be worked out, clearly an offence like emergency response affecting health and safety would be deemed serious.

Q: How will fines and penalties be levied?

A: Fines will be imposed through a Director's order. Organizations will also have the right to appeal fines to the Licensing Appeal Tribunal.

Conclusion

Emergency response planning is required of all Canadian employers. And, whether it's specifically expressed or implied, addressing the special needs of disabled employees is a part of that obligation. The emergency response requirements contained in the new Ontario accessibility regulation didn't invent that obligation; but they clarify what employers should do to meet it. If you're in Ontario, you must ensure you take the necessary measures by Jan. 1; if you're not in Ontario, you should use the standard as a kind of Best Practice to assess and improve your own efforts to protect disabled employees in workplace emergencies. 

For More on Ontario Accessibility Requirements

You can access a full transcript of the interview, including what Mr. Spencer had to say about other aspects of the employment accessibility standards at www.hrcomplianceinsider.com.





5 STEPS REQUIRED UNDER EMERGENCY RESPONSE LAWS

Step 1: Assess Special Needs

Determine which of your employees have disabilities that compromise their ability to respond to emergencies, e.g., mobility impairments that preclude them from evacuating by stairs.

Step 2: Determine Necessary Accommodations

Figure out what you can do to overcome the problems identified in your hazard assessment. Example: Options for accommodating an employee in a wheelchair who can't climb stairs include:

-  Technological solutions like an emergency evacuation chair;
-  Design solutions like creating a safe refuge area where the employee can shelter in-place during the emergency;
-  Assigning the employee to work on the ground floor; and
-  Designating 2 or more emergency wardens or co-workers to be responsible for carrying the employee down the stairs in an emergency.

Step 3: Provide Employees Necessary Training and Information




Make sure the employee and other members of the emergency response team understand and are capable of performing their roles in the response plan.

Step 4: Practice, Practice, Practice

Ensure that disabled employees and the co-workers designated to help them participate in the drills you conduct to test your response plan.

Step 5: Make Necessary Changes

Review your emergency response measures for disabled employees:

-  When job assignments or locations change, e.g., one of the rescue wardens responsible for evacuating the employee leaves the company;
-  When work conditions and/or physical configurations change, e.g., installation of new work stations block exit routes; and
-  As part of your regular general emergency response review.

PREGNANCY DISCRIMINATION

TEST YOUR HR I.Q.

Reassigning Pregnant Employees for their Own Health & Safety

SITUATION

Security guard Jess Tate, notifies her boss that she's 3 months' pregnant. Not 30 minutes later, she receives a letter from the company that contains the following line: "Due to health and safety issues and on behalf of our company policy, as soon as we are aware that a security guard has become pregnant, we must take them off the schedule." Jess's boss advises her to get a doctor's note saying that her job will endanger the baby so that she can go out on short-term disability. Jess doesn't feel disabled. In fact, she's healthy, and feels perfectly capable of performing guard duties until the last 6 weeks of her pregnancy. But the company holds to its policy and refuses to even consider whether Jess is physically fit for guard duties.

QUESTION

Is the company policy of not letting pregnant women perform guard duties discriminatory?

- A. No, because the policy is a BFOR.**
- B. No, because the policy is required by OHS laws.**
- C. Yes, because the policy is based on stereotypes about pregnancy rather than employees' actual physical abilities.**
- D. Yes, because pregnant women are perfectly capable of performing guard duty.**

ANSWER

C. The policy is discriminatory because it treats all pregnant guards as unable to carry out physical duties without considering their actual abilities.

EXPLANATION

OHS laws require companies to protect the health and safety of pregnant employees. But human rights laws ban discrimination against and require accommodation of employees who become pregnant. This scenario, which is based on a recent Ontario case, illustrates the interplay between these 2 sets of obligations.


In the actual case, the Ontario Human Rights Tribunal ruled that the company policy of automatically removing guards from their schedule once they become pregnant was discriminatory because it was based on stereotypes about what pregnant women could and couldn't do. In

essence, the company treated pregnancy as a physical disability even though pregnant women may be perfectly capable of physical labour. So, the Tribunal ordered the company to pay the guard \$20,000 in damages, plus lost wages.

WHY WRONG ANSWERS ARE WRONG

A is wrong because to prove a BFOR (bona fide occupational requirement), the employer must show that there's no less restrictive way to achieve the purpose of a restrictive policy (in this case, protecting Jess's health and safety). But the company made no effort to accommodate Jess by assessing her physical condition and making a determination of her actual capability of continuing to work as a guard.

B is wrong because even though the OHS laws *do* require employers to ensure the health and safety of pregnant employees, they typically don't specify the methods employers must use—at least, they don't in this case. And, in any event, measures to protect a pregnant employee's health and safety must be consistent with the employer's duty to accommodate under human rights laws.

D is wrong because it goes too far in the other direction. Pregnancy *can* be a barrier to physical labour. Although it's not a disability, pregnancy does raise safety and health hazards that employers can *and must* address. The point of this scenario is that you can't impose blanket health- and safety-based restrictions on the basis of generalized assumptions about the capabilities of pregnant women; you must consider each situation individually based on an assessment of the hazards involved and the physical condition of the particular employee. 

SHOW YOUR LAWYER

Graham v. 3022366 Canada Inc. (c.o.b. Response Safety Security & Investigation), [2011] O.H.R.T.D. No. 1472, Aug. 5, 2011

PRIVACY

WINNERS & LOSERS

Right to Monitor Hard Drives of Employees' Work Computers

Employers are allowed to monitor employee usage of company work computers; but employees also have privacy rights in the personal information contained in their computer files. As HR director, you need to understand—and ensure that the IT people who conduct computer monitoring at your organization understand—where the privacy lines are drawn. The key question: Does the employee have a reasonable expectation of privacy in the information? As illustrated by the following cases, the terms of your computer usage policy play a key role in determining whether an employee's expectations of privacy in the information contained in her work computer are reasonable.

NO REASONABLE EXPECTATION OF PRIVACY


FACTS

A junior high issues laptops to its teachers. The school allows teachers to use the laptops for personal purposes; but it also clearly states in its computer use policy that the IT administrator may access the hard drives to maintain the integrity of the network. After detecting unusually high traffic with the server, the IT administrator does a security check and finds a hidden file containing nude photos of a student on a science teacher's laptop. The teacher is fired.

DECISION

The Ontario Court of Appeal rules that the search didn't violate the teacher's privacy.

EXPLANATION

The teacher had no reasonable expectation of privacy in the information on his hard drive, the Court concluded. Even though he kept the porn in a hidden file, the teacher knew full well that the school's network administrator had the technological capacity and authority to access the hard drives of school laptops to maintain the integrity of the network. And that's exactly how the school came to find the materials. 

R. v. Cole, [2011] O.J. No. 1213, March 22, 2011

REASONABLE EXPECTATION OF PRIVACY


FACTS

At 8:46 AM, a university supervisor sends an email to teachers to notify them of a reallocation of job tasks within his group. A few minutes later, before he's even had a chance to tell HR about the decision, the supervisor receives a call from the union objecting to the reallocation. Appalled that the news has leaked, he orders a complete review of the computer servers. IT finds that one of the teachers forwarded the note to the union 6 minutes after receiving it with the heading "For your information." The teacher claims the university violated his privacy.

DECISION

The arbitrator rules that the email search violated the teacher's privacy rights under the Québec *Charter of Human Rights and Freedoms*.

EXPLANATION

Unlike in *R. v. Cole*, the computer search was inconsistent with the terms of the employer's computer usage policy. Under university policy, email could be reviewed only if: 1. There were serious reasons to suspect a violation of laws or university policy; 2. The department head needed the information and couldn't reach the user; or 3. An investigation was done by the police. The supervisor knew full well that none of these conditions existed and ordered the search anyway. So the arbitrator concluded that the search was a privacy violation. 

Université Laval c. Assoc. du Personnel Administratif Professionnel de l'Université, 2011 CanLII 6946 (QC SAT), Feb. 3, 2011

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