

# HR Compliance

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

# INSIDER

Volume 8 Issue 1

## EMPLOYEE BENEFITS

### Paying Benefits of Employee Covered by Spouse's Plan

THIS STORY WILL HELP YOU

Cut costs and ease benefits processing using Coordination of Benefits

**C**ouples where both spouses work pose HR challenges—as well as opportunities. Case in point: employees who are members of your group health and/or dental plans and are also covered by their spouse's plan. Having another payer in the picture complicates claims processing; but it also creates an opportunity to save money and expand the employee's coverage. To reap these benefits, you must implement a "coordination of benefits" (COB) system. Here's how COB works—and a quiz to help you apply the rules to real-life benefits situations.

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## DISCIPLINE

### 8 Traps to Avoid in Responding to Work Refusals

THIS STORY WILL HELP YOU





Minimize the disruptions and liability risks of dangerous work refusals

**R**esponding to dangerous work refusals isn't simply about figuring out if an employee's fears are reasonable; a big part of the challenge is ensuring that you follow the proper procedures for investigating work refusals set out in your jurisdiction's OHS laws. Many a company with a strong case on the merits has ended up on the wrong end of a refusal case because of a procedural snafu. Here's a look at 8 of the most common work refusal response traps and how to avoid them.

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### COORDINATION OF BENEFITS CONTINUED FROM FRONT

#### Advantages of COB

Using COB can cut benefits costs—an average of up to 10% per year, according to insurance company estimates. Potential savings achieved by individual plans depends on factors like the demographics of plan members. Thus, for example, COB has the most impact in companies where employees are married and have coverage from their spouse's employer; conversely, COB savings are likely to be marginal at organizations like tech companies that hire mostly single people.

COB also offers advantages to employees, principally the opportunity to expand their medical and dental coverage. Typically, individual employer plans cover only part of a claim; by adding a payer, COB can result in more extensive coverage even up to 100% of the covered service.

#### WHICH PLAN PAYS FIRST

Which plan pays first when an employee who belongs to a group benefits plan offered by your organization is also covered by a group plan through their spouse?

#### Basic Rule: Employee Plan Pays First

The basic rule is that the employee must submit the claim to his own plan first. The insurer then pays the claim as if it's the only payer, subject to any deductibles or maximums that apply. Then, if there's a balance, the bill can be submitted to the spouse's insurance carrier for coverage as a dependent under the spouse's plan.

#### Employees with Coverage under Multiple Plans

What happens when an employee has coverage under not one but multiple plans provided by his own employer(s), e.g., where an employee has 2 part-time jobs with employers that both provide group health plans? In this situation, the plan that covered the employee the longest pays first. If there's a balance remaining after the second plan pays, the claim can be submitted to the spouse's plan, subject to any maximum procedure payment in the successive plans.

**Example:** Floyd has part-time jobs with Company A and Company B, both of whom provide group health coverage. He's been in Plan A since March 2007, and Plan B since May 2008. Plan A pays first; Plan B pays next; and any remaining balance would be paid by Floyd's wife's plan, subject to the maximum procedure payment in the successive plans.

#### Claims for Dependent Children

Another common COB situation is where the couple has kids who are covered as dependents under both plans. The basic rule: The plan of the parent with the earlier birth date in the calendar year—which is not necessarily the parent born first—pays first.




**Example:** Mom born June 3, 1962; Dad born Jan. 2, 1963. Dad's plan pays first.

If both parents have the same birth date, whichever parent's first name comes first alphabetically pays first.

**Example:** Ann and Bob were both born on Jan. 2. Ann's plan pays first.

#### Claims for Single and Joint Custody Children

Here's the pecking order when one parent has sole custody of the child(ren):

-  Plan of custody parent, i.e., the parent with whom the child(ren) live, pays first;
-  Plan of current spouse of custody parent, if there is one, pays next; and
-  Plan of parent without custody pays last.

## HR Compliance **INSIDER**

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In cases of joint custody, the plan of the parent with the earlier birth date in the calendar year pays first; if joint custody parents have the same birth date, the plan of the parent with the earliest alphabetical first name—Ann over Bob—pays first.

### Claims for Post-Secondary Students

Some university or college students have health coverage through their school or part-time job. These plans pay first. Plans of parents covering the student as a dependent pay next.



### Retiree Claims

A retiree plan pays second after a group plan that covers the same individual as an active, full-time employee. If an individual is covered by more than 1 retiree plan, the plan in which he's been a member the longest pays first.

## HOW BENEFITS ARE CALCULATED

Once it's determined which plan pays first, how are benefits calculated?

**The basic rule:** The plan that pays first calculates benefits like any other claim as though there's no duplicate coverage. The plan that pays second calculates benefits for each individual item on the claim based on the lowest of:

-  The amount it would have paid if it had paid first; or
-  100% of the eligible expenses minus the benefits paid by the first plan.

Combined payment from all plans can be up to but can't exceed 100% of the covered services. In some cases, the combined payment will be less than what the employee would have paid out of pocket. Any benefits or visits paid by the plans also count toward benefit and visit restrictions under both plans.





## COB ADMINISTRATION ISSUES

If both plans provide prescription drug cards, COB takes place electronically at the point of sale. That relieves plan members of the burden of having to send paper claims to one company first and then the other. When the employers of both spouses are insured with the same company, insurance companies may coordinate benefits based on a single claim, rather than requiring the employee to resubmit.

You need to communicate to employees the importance of completing their enrolment forms fully and accurately. There also has to be a system to report and process changes in status potentially affecting COB payment arrangements and calculations, such as a spouse's job loss or loss of coverage, divorce, remarriage and custody arrangements. The insurer will furnish the necessary forms. You also have to inform employees covered by more than one group benefit plan how to opt out of your plan, if you allow for opting out.

## Conclusion

Keep in mind that the above COB rules *don't* apply to all situations where an employee's group health or dental insurance is overlapped by another insurer, including:

-  **Auto Insurance:** Where overlapping coverage is available under auto insurance, provincial rules determine if the auto insurer or group health/dental plan pays first;
-  **Out-of-Country/Province Health Care Expenses:** There are special COB rules for determining which plan pays for these emergencies first; and
-  **Workers' Compensation:** COB rules are pre-empted by workers' compensation in terms of determining coverage for work-related injuries and illnesses. 

## WHICH PLAN PAYS FIRST?

*Now see if you can apply the rules.*

### SCENARIO

After 20 years of marriage and 2 lovely kids, Ben Nafitz and Nora Gretz divorce amicably. Ben and his new wife, Ethel, have sole custody of the kids. Ben has a full time job with Employer A and has belonged to the company's group health plan (Plan A) since 2008. Ben gets a part-time job with Employer B in January 2009, and enrolls in its health plan (Plan B) 6 months later. Ben is also a beneficiary of both Ethel and Nora's employer-provided plans. The kids are also eligible for coverage under Ethel and Nora's plans and named as dependents in all 4 plans. One of the kids gets the mumps. Individually, none of the plans provides full coverage of the claim.

### QUESTION


**Which plan pays first? List the order of payment.**

### ANSWER

**Plan A pays first** because: i. Ben has sole custody of the kids and the custody parent's plan pays first; and ii. Plan A pays before Plan B because Ben has been in Plan A longer. (**Note:** The fact that Ben is a full-time employee of Company A and just a part-time employee of Company B is irrelevant.)

**Plan B pays second** because it's the only custody parent plan left.

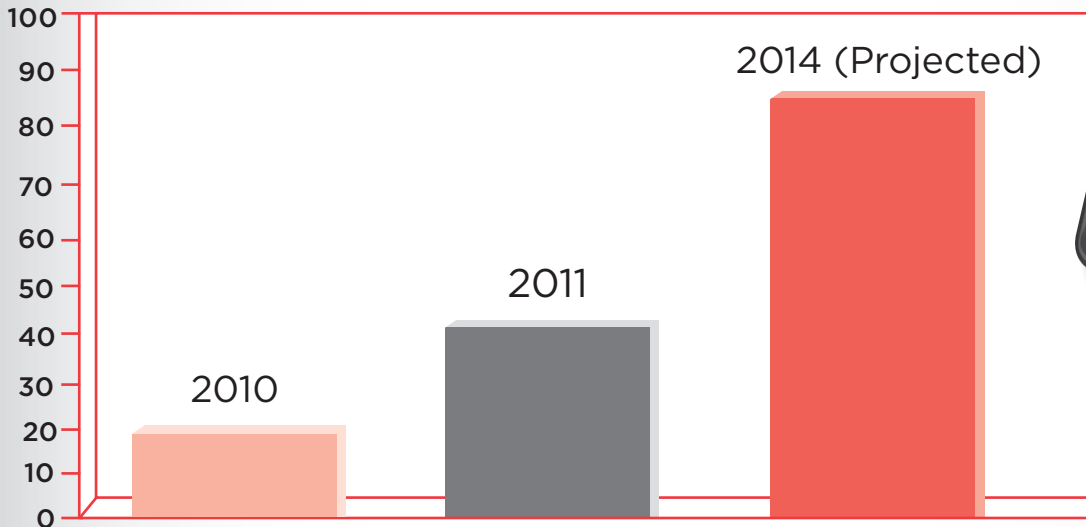
**Ethel's plan pays next** because she's the current spouse of the custody parent.

**Nora's plan pays last** because the non-custody parent plan is the last to pay. 

# ELECTRONIC WORKPLACE

HR By the Numbers: Mobile Device Usage Trends & Impact on HR

## SMARTPHONE USAGE - CANADA



\*Sources: Aggregate research findings from Nielsen, TNS and Canadian Radio-Television and Telecommunications



### THE TREND

Ten years ago, it was all about going electronic. Today, it's about going mobile.

#### Exhibit A: Smartphones

In 2010, 18% of Canadians used smartphones; that rate more than doubled to 41% this year; and by 2014, smartphone usage among Canadians is expected to hit 85%.

#### Exhibit B: Tablets

Tablets, like the iPad, are the next wave in mobile. Currently, only 7% of Canadians use tablets; but that number is expected to reach 31% in 2012.


### IMPLICATIONS FOR HR

These trends have far-reaching implications for HR, especially recruitment. As an HR director, you need to recognize that recruits and others are going to be accessing online information about your organization using mobile devices rather than laptops and PCs. You'll need to adjust your recruiting messaging and tactics accordingly. Now is the time to start the transition.

### Are You Prepared to Communicate with Job Candidates via Mobile?

With mobile, online images and information are smaller and consumed on the go. Traditional job postings and long emails don't transfer well to this medium. Recruiting communications will thus have to be made more succinct to resonate on a handheld device. Adjustment may also include using a short message service (SMS) recruitment component rather than email.

You might also have to reconfigure your corporate careers site to make it more accessible to mobile users, e.g., by replacing text heavy descriptions with photographs and graphic images of your organization.

You also need to recognize the opportunities created by these changes in the pattern of accessing information online. Mobile allows for one-to-one communication; it also enables an organization to reach a potentially huge audience. When looking to fill high volume entry- and mid-level jobs, mobile can be an ideal way to reach out to large numbers of candidates. 





## HR MONTH IN REVIEW

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

### LAW OF THE MONTH

#### Bill 14: BC Opens Pandora's Box on Workers' Comp & Mental Stress

When the industrial revolution began, workers were sent into the factories, mines and mills without protection. The 20th century's answer to this was to enact occupational health and safety and workers' compensation laws. The 21st century is witnessing the evolution of these laws to protect workers from not just the physical but mental hazards of the workplace. In what may prove a watershed moment in this evolution, BC just proposed a bill to expand workers' comp coverage of mental stress. Here's a look at Bill 14 and what it portends inside and outside BC.

#### OVERVIEW




**What's the Issue:** The mental damage that workers are suffering as a result of work stress has become a major societal problem. Workers' comp pays benefits for work-related injuries and illnesses. The problem is that unlike a machine injury or chemical burn, it's often difficult to pinpoint the precise cause and onset of mental illness.

**The Current Law:** As in the rest of Canada, workers' comp in BC covers only mental stress suffered as a result of a discrete and traumatic event at work, like seeing a co-worker get killed. But most work stress injuries result not from a single dramatic incident but build-up of stress over time.


**What the New Law Would Require:** Bill 14, which received first reading on Nov. 3, would extend workers' comp coverage to not only discrete, traumatic events but "cumulative series of significant work related stressors" experienced at work. Although not spelled out in the actual bill, the government has suggested that it would impose limitations:

**Diagnosis:** First, the worker would have to get a "recognized diagnosis" of stress from a doctor.

**Normal Work Pressures Don't Count:** The stress created by employment decisions like getting fired, disciplined or required to adapt to new working conditions, wouldn't count as work stress. Examples of stress that *would be* covered:

-  Gradual development of post-traumatic stress by emergency service personnel as a result of dealing with traumatic events on the job each day;
-  Being subjected to violence or bullying at work; and
-  Ongoing sexual harassment.




#### ANALYSIS

Extending worker's comp coverage to gradual stress better reflects current medical understanding of what stress is and how it develops. The problem is that workers' comp isn't the right vehicle for this kind of thing. The scheme was and is designed to insure against illnesses and injuries that occur in the workplace and only the workplace. Work causes stress; but so, potentially, do many other factors. Trying to sort out the distinct causes in individual claims is likely to require extensive and expensive adjudication. 

#### LAWS & ANNOUNCEMENTS

##### Privacy

Oct. 31: The Privacy Commissioner issued an open letter attacking 3 recent federal bills that would give the government access to private information for law enforcement operations:

-  Bill C-50 making it easier for police to get warrants to track e-communications
-  Bill C-51 giving police power to force telecom companies to turn over information
-  Bill C-52 requiring telecoms to build and maintain intercept capacity for use by law enforcement.

##### CASES

##### Company Not Responsible for Wage Obligations of Related Companies

A service manager won a wrongful dismissal lawsuit and \$20,363 in damages against the car dealerships he worked for. Unfortunately, those dealerships were now bankrupt. So the manager sued the real estate holding company owned by the person who owned the dealerships, which was still operating, claiming all 3 companies were related entities. The court ruled that the real estate company wasn't a "common employer" liable for the other 2 companies' wage obligations under the ESA because it didn't exercise control over the dealerships' operations or the manager's employment [*Asselin v. Gazarek*, 2011 ONSC 5871 (CanLII), Oct. 10, 2011].

#### CASES cont'd

##### Smashing Lock Is Final Straw Justifying Termination

An employee with a long disciplinary record used up his last chance by using a pipe to smash the lock on a gate to a restricted area in front of his supervisor. Added to his previous offences—not wearing safety glasses, threatening and disrespectful conduct to supervisor and leaving grease-covered gloves on a co-worker's computer keyboard with a sarcastic note—and failure to take responsibility for his actions, the latest incident was enough to support termination [*Algoma Tubular Seamless Inc. v. United Steelworkers, Local 9548*, [2011] CanLII 62772 (ON LA), Oct. 7, 2011].

##### \$30K for Failing to Accommodate Employee with Chemical Sensitivities

An arbitrator ruled that a teacher with Multiple Chemical Sensitivities had a disability. The school tried to accommodate her but couldn't find a way for her to resume full-time duties. Had the school reached the point of undue hardship? Because the teacher decided to retire, the point was moot. But the arbitrator still faulted the school's accommodation efforts and ordered it pay the teacher \$30,000 in damages [*Toronto District School Board v. Ontario Secondary School Teachers' Federation, District 12 (Ms. P. Grievance)*, [2011] O.L.A.A. No. 461, Sept. 21, 2011].

##### No Cause to Fire Employee on Maternity Leave

While on maternity leave, a legal assistant sent an email reminding her firm that it was legally bound to keep her job open for a year. Firm management found the note insubordinate and, coupled with her performance problems, decided it had cause to terminate. Not so fast, said the Ontario Labour Relations Board. You never talked to the assistant about performance problems; and the email wasn't insubordinate. So the termination was wrongful and the firm had to pay \$8,812 in lost wages and damages [*Heydary Hamilton PC v. Edwards*, [2011] CanLII 61719 (ON LRB), Oct. 4, 2011].

##### Termination Too Severe for Kicking Down Supervisor's Door

An employee was caught smoking in the plant and sent to his supervisor's office. The office door was locked, so, in a fit of anger, he kicked it in. The pink slip soon followed. Although discipline was warranted, the employee expressed sincere remorse and volunteered for anger management. So the arbitrator knocked the penalty down to suspension without pay and ordered him reinstated under an 18 month Last Chance arrangement [*Tenneco Canada v. United Steelworkers, Local 2894 (Whitelaw Grievance)*, [2011] O.L.A.A. No. 434, Sept. 7, 2011].

##### Employee with Colitis Should Be Allowed to Use Bathroom As Needed

An employee with colitis who had trouble regulating her bowel movements was harassed by a co-worker for running off to the bathroom during her shift and ordered by her supervisor to use the restroom only during scheduled breaks. When she went to management seeking accommodation, she was fired. The Human Rights Tribunal found the company liable for not accommodating her disability [*Pilon v. Cornwall (City)*, [2011] O.H.R.T.D. No. 1706, Sept. 14, 2011].



ONTARIO

**LAWS & ANNOUNCEMENTS****LAWS & ANNOUNCEMENTS****CCP**

Nov. 1: CRA released the CPP rates for 2012:

Amount/Rate	2012	2011
Maximum pensionable earnings	\$50,100	\$48,300
Basic exemption	\$3,500	\$3,500
Employee & employer contribution rate	4.95%	4.95%
Self-employed contribution rate	9.9%	9.9%
Maximum employer & employee contribution	\$2,306.70	\$2,217.60
Maximum self-employed contribution	\$4,613.40	\$4,435.20

**Executive Compensation**

Oct. 31: Changes to the Canadian Securities Administrators Form 51-1026F6, Statement of Executive Compensation and Form 58-101F1, Corporate Governance Disclosure, take effect:

- ✦ Company must state if it's relying on "serious prejudice" exception to avoid disclosing executive performance goals
- ✦ More detailed disclosure of compensation committee's consideration of risks of company compensation practices
- ✦ Company must disclose if it lets officers or directors buy financial instruments hedging positions in equity securities
- ✦ Company must disclose basis for calculating grant date value of stock options.

**Drug Testing**

Oct. 7: Transportation Safety Board investigators found traces of marijuana in the system of an engineer involved in a BC train crash and derailment; crew members also made cell phone calls during the trip. In addition to firing the engineer and conductor, Canadian Pacific Railway responded by tightening its ban on use of personal electronic devices while on the job and plans to introduce saliva testing for drug and alcohol in January.

**Collective Bargaining**

Oct. 21: Progress was made on some big labour deals:

- ✦ Port of Québec longshoremen (CUPE, Local 216) ratify collective agreement
- ✦ St. Lawrence Seaway management reached agreements with supervisors, operators and maintenance employees
- ✦ OC Transpo and bus drivers, mechanics and dispatchers agreed to one year extension of collective agreement
- ✦ Air Canada and 6,800 flight attendants settled their dispute and avoided a strike.

**LAWS & ANNOUNCEMENTS****Labour Market**

Oct. 20: Parts of the recent Throne Speech touching on HR and labour:

- ✦ Keep increasing the minimum wage
- ✦ Create more apprentice and skilled trade jobs across the province
- ✦ Launch the Journeyman Business Start program in Northern Manitoba
- ✦ Create new skilled trades and technology centre at Red River College.

**Collective Bargaining**

Oct. 7: Doctors ratified a new 4-year agreement with the government. Key terms:

- ✦ General rate increase of 10.6% over term of agreement
- ✦ 66% increase to Physician Retention Fund to keep doctors in Manitoba
- ✦ New fee tariffs for chronic disease management services
- ✦ Newly recruited doctors must participate in Family Doctor Connection Program.

**Workers' Compensation—Procurement**

Oct. 29: The Workers' Comp Board began using a new electronic service to field and solicit bids for procurement. To register with the MERX Private Tenders service, bidders must pay a \$25 "Pay As You Go" fee or \$150 to subscribe to unlimited access to all WCB documents.

**Workers' Compensation—Registration**

Oct. 24: New employers in Manitoba can now register with Workers' Comp online, 24/7, using the Employer Registration Request service. You can still register by phone or in-person if you prefer.

**LAWS & ANNOUNCEMENTS cont'd.****Privacy**

Oct. 6: The Privacy Commissioner issued a new **interpretation bulletin** on the privacy rights of employees under PIPEDA. Highlights:

- ✦ PIPEDA privacy protections don't apply to employees unless those companies are federally regulated
- ✦ Where PIPEDA does cover employees, it protects performance reviews, internal investigation files, complaints about an employee and other views or opinions about the employee
- ✦ Other private employee information protected by PIPEDA includes employee numbers, employee voices, swipe cards and video footage or live-feed and salary, benefits and performance ratings.

**CASES****Driver Fired for Not Revealing Loss of Licence**

A car service fired a driver after learning that he had worked for the company for over a year while his driver's licence was revoked. Amen, said the arbitrator. Driving without a licence is illegal and put the service at liability risk. The driver had also signed written policies acknowledging that he needed a valid driver's licence and had to inform the service if his licence was revoked [*Collins v. Cascade Services 2008 Ltd.*, [2011] C.L.A.D. No. 284, Sept. 16, 2011].

**Web Browsing at Work ≠ Stealing from Employer**

A government agency did an internal investigation and found that over large parts of a 2-year period, an employee had spent between 50% and 75% of his work hours surfing the net for non-work purposes, including porn. The arbitrator agreed that the employee deserved serious punishment but said termination was too severe given his clean disciplinary and excellent service record of 27 years. So she ordered a 7-month suspension instead. And she refused to order the employee to pay back the employer for "stolen time." Surfing the web isn't theft unless the employee really intends to steal [*Andrews v. Deputy Head (Dept. of Citizenship & Immigration, August 2011)*].

**LAWS & ANNOUNCEMENTS****Collective Bargaining**

Oct. 7: The Saskatchewan Watershed Authority and the union representing 120 water source staffers ratified a new 4-year deal that provides a total 7.5% pay increase and pension improvements.

**Workers' Compensation**

Nov. 1: The Workers' Comp Board issued a new version of the **W6, Workers' Expense Statement**, reflecting the following allowances:

- ✦ Transportation: 39.68¢ per km
- ✦ Meals: Breakfast—\$8; Lunch—\$14; Supper—\$19
- ✦ Lodging: \$35 per night.

**Pensions**

Oct. 26: The Financial Services Commission issued a **revised policy bulletin** to clarify how a transfer deficiency is to be administered when a former member entitled to plan benefits dies. Under Sec. 28 of the Pensions law, plan administrators must make transfer deficiencies when plans have a solvency ratio of 1:1 or less.

## LAWS & ANNOUNCEMENTS

### Work Safety

Oct. 29: The government updated its online workplace injury online information service. The database, which has been moved over to the [Ministry of Human Services website](#), lists 5 years worth of lost-time work claims, claim rates, fatalities and other work injury information regarding particular employers.

### Workers' Compensation

Oct. 24: The Workers' Comp Board reminded employers that it will no longer be mailing out annual premium rate statements. From now on, the only way to get a statement will be online. 2012 premium statements will be posted in December.

### Pensions

Oct.: The Superintendent updated 3 new pension bulletins:

- ✦ [Policy Bulletin #7 - Membership in a Pension Plan](#) to indicate that pension plans can be closed to new entrants by using dates to define member class, and clarifying that DB retiree may return to work, keep getting a pension and earn DC benefits if plan allows
- ✦ [Policy Bulletin #29 - Notification of Adverse Amendments](#) housekeeping changes
- ✦ [Policy Bulletin #34 - 50% Unlocking](#) housekeeping changes.

## CASES

### Images of Employees in Company Promotional Video Not Privacy Protected

A towing company hired a contractor to produce a promotional video about the company and its operations. Two employees who appeared in the video and later left the company claimed that airing of the video and posting it on the company's Facebook page was a privacy violation. The Privacy Commissioner disagreed. Video images of employees, recordings of their voice, etc. are considered "work product" not protected by privacy if they're gathered in the course of the employee's employment in carrying out normal employment duties, the Commissioner explained [*Double L Towing*, Order P2011-002, No. P1714, Sept. 29, 2011].

### Employee Shoulder Injury Isn't Work-Related

An employee who claimed that he tore his left rotator cuff operating a saw at work won workers' comp benefits and the employer appealed. The Appeals Commission ruled that the injury wasn't work-related, citing medical evidence of the employee's prior shoulder problems. The saw also didn't provide enough kick-back to tear a shoulder and the employee was able to shovel snow at home [*Decision No. 2011-897*, [2011] CanLII 62590 (AB WCAC), Oct. 5, 2011].

ALBERTA

## LAWS & ANNOUNCEMENTS

### Workers' Compensation

Oct. 5: WorkSafeNB announced a 15% decrease in the average assessment rate from \$2.00 per to \$1.70 of \$100 assessable payroll for 2012. The minimum assessment rate will also be reduced, from \$0.32 to \$0.28. The Yearly Maximum Assessable Earnings ceiling amount will be \$58,100.

### Collective Bargaining

Oct. 21: The government signed a 4-year agreement with about 2,700 administrative assistants, providing for a 2-year wage freeze followed by 2% general economic increases in years 3 and 4.

NB

## CASES

### Supervisor, Excavation Company Charged with OHS Offences

Supervisor liability for OHS offences, commonplace in Alberta, BC and Ontario, is now spreading to Newfoundland. *Exhibit A*: Unsafe operation of an excavator by a worker removing asphalt during parking lot repaving of a parking lot resulted in the laying of 7 OHS charges, 3 against the excavation company and 4 against the supervisor [*Farrell's Excavating Ltd.*, Govt. News Release, Oct. 14, 2011].



## LAWS & ANNOUNCEMENTS

### Minimum Wage

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

### Human Rights

Oct. 17: According to the Human Rights Commission's [Annual Report](#), there were 1,163 new discrimination claims filed in 2010-2011, 55% of which were employment-related. Most frequent grounds:

- ✦ Physical disability (23%)
- ✦ Sex, including harassment and pregnancy (14%)
- ✦ Mental disability (14%)
- ✦ Race (9%)
- ✦ Place of origin (6%)
- ✦ Age (6%).

### Pre-Employment Screening

Oct. 12: BC became the first province to issue [guidance on use of social media](#) to conduct pre-employment background checks. Highlights of Privacy Commissioner's report:

- ✦ Information about individuals on social network sites is privacy protected
- ✦ Employers should do privacy impact assessment of risks before collecting personal information on social network sites
- ✦ Consider less intrusive means to gather information
- ✦ Notify individuals before collecting information about them
- ✦ Keep information collected to least necessary to fulfill check's purpose.

### Privacy

Oct. 4: Highlights of proposed privacy law changes:

- ✦ Let citizens consent to collection of their private info to improve service delivery
- ✦ Develop system to ensure citizens secure online government ID
- ✦ Allow info sharing of personal info by multiple government agencies.



BRITISH COLUMBIA

## LAWS & ANNOUNCEMENTS cont'd.

### Workers' Compensation

Oct. 13: The 2012 average base rate will remain unchanged at \$1.54 per \$100 of assessable payroll. The base rate will decrease for 53% of employers, increase for 39% and stay the same for 8%. WorkSafeBC also projects a deficit at the end of 2011 and a modest base rate increase in 2013.

### Immigration

Oct. 13: Changes were made to the Nominee Program to help the province attract entrepreneurs from abroad who can create job opportunities in BC. Highlights:

- ✦ New online service matching immigrants to business opportunities
- ✦ More aggressive marketing of PNP in Latin America, Eastern Europe, Russia and India
- ✦ Let immigrants who acquire existing businesses in BC use existing jobs to meet employment commitments
- ✦ Make Entry Level and Semi-Skilled pilot a permanent program category.

### Collective Bargaining

Oct. 17: Social service workers ratified a new collective agreement with the Community Social Services Employers' Association covering about 14,000 social workers employed by more than 200 different agencies province-wide.

## CASES

### Employer Hammered for Firing 62-Year-Old, Newly Widowed Employee

A 62-year-old lending manager earning about \$125,000 was fired for sending an email containing dirty jokes to 9 co-workers, including his supervisor. But the jokes weren't all that offensive. And since the manager had just lost his wife to cancer and had been with the firm 18 years, the employer scrapped its just cause claim and offered the manager the 8 weeks' notice required by law. Not good enough, said the manager. The court agreed, awarding the manager 18 months' notice, his annual \$10,000 bonus, annual RRSP contributions (8% of salary) and medical and dental benefits [*Szcypiorowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376, Oct. 17, 2011].

### Steelworker Laid Off for Lack of Work, Not Disability

A steelworker claimed he was laid off because he had seriously injured his knee on the job. His employer claimed the decision was the result of a work shortage. The BC Human Rights Tribunal believed the employer and dismissed the worker's disability discrimination claim. The decision to lay off the worker was made before the injury, the Tribunal concluded, noting that the company was winding up its projects and had no new work on the horizon [*Broderick v. Namdor*, [2011] B.C.H.R.T.D. No. 254, Sept. 16, 2011].

**LAWS & ANNOUNCEMENTS****Labour Market**

Oct. 21: Employment in the Territories stood at 73.9% in September, as compared to 62.6% nationwide. That's an increase of 300 jobs since August, according to Statistics Canada.

**CASES****Human Rights Discrimination to Take Part in Saskatchewan Hate Speech Case**

William Whatcott, a conservative social activist, has been at the centre of a legal storm for distributing flyers conveying hate messages referring to gays and lesbians as "sodomites" and "pedophiles." The Saskatchewan Human Rights Tribunal found Whatcott guilty of discrimination but the Court of Appeal overturned the decision in favour of free speech. The case has gone to the Supreme Court of Canada and now the NWT Human Rights Commission has gotten permission to intervene. The Commission will argue against letting Whatcott off the hook lest it encourage hate speech against Aboriginal communities.

**NOVA SCOTIA****LAWS & ANNOUNCEMENTS****Minimum Wage**

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

**Labour Standards**

Nov. 7: The government ended the comment period on a proposal that would grant unpaid leave under the *Labour Standards Code* to immigrants so they can attend their citizenship ceremonies.

**Human Rights**

Oct. 24: The Human Rights Commission issued new guidance explaining the changes to discrimination dispute resolution procedures that take effect on Jan. 1. Under the new rules, once a new complaint is made, a date will be chosen to get all of the parties together. If a resolution isn't reached, Commission mediators will make a recommendation to either dismiss or let the complaint proceed based on what happened during settlement negotiations.

**Jobs**

Oct. 31: The government rolled out its jobs creation bill. Effective April 1:

- ✦ Nova Scotia Jobs Fund will replace 60-year-old Industrial Expansion Fund
- ✦ New Cabinet agency called Economic Investment Committee will run the Fund
- ✦ Fund will concentrate on regional, industry-specific and strategic initiatives.

**Collective Bargaining**

Oct. 7: The Nova Scotia Teachers Union, representing 10,000 public school teachers, ratified a new 2-year agreement. The agreement provides teachers a 1% salary increase in each year and establishes a new joint committee to study teacher workload issues.

**CASES****Safety Director Personally Liable for OHS Violation**

For only the second time—both in Nova Scotia—a company safety director was held personally liable for an OHS violation. The safety director of a housing authority was fined \$1,000 for not telling his supervisors and managers about test results confirming the presence of asbestos on a construction project. As safety director, he "bore a general responsibility for health and safety within the organization," the court found. Since Nova Scotia doesn't specifically list duties of company safety directors in its OHS laws—no jurisdiction does—the director was convicted as an "employee" for not protecting co-workers [*R v. Della Valle*, [2011] NSPC 67 (CanLII), Sept. 14, 2011].

**Physical Reaction to Scented Product Is Work Injury**

After being exposed to a scented product at work, a worker developed a headache, confusion, impaired concentration and nasal congestion. Her workers' comp claim was originally denied but approved on appeal. The employer was aware of her condition and imposed an informal no-scent policy. But co-workers used scented products anyway. And medical evidence showed that her symptoms were caused by exposure to a scented item on the job [*Re: 2011-180-AD*, [2011] CanLII 56784 (NS WCAT), Sept. 14, 2011].

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

Oct. 4: According to an IRSST study, over 50% of students that have jobs while enrolled in their studies experience problems with sleep as well as enhanced exposure to musculoskeletal injuries, especially in their legs and feet.

**Pensions—Supplemental Plans**

Oct. 12: The Oct. issue of the *Québec Gazette* includes amendments to a pair of regulations dealing with the funding rules for the exemption of certain plans from the *Supplemental Pensions Plans Act*.

**Pensions—Multi-Jurisdictional Plans**

Oct. 5: The Régie's newsletter explains the new rules that apply to plans that have members who are regulated by the pension laws of Québec and Ontario. A so called multi-jurisdictional agreement between those 2 provinces took effect last July. Highlights:

- ✦ Rules of Major Authority (i.e., jurisdiction with most active members) regulate plan administration, investment and registration
- ✦ Rules of Minor Authority apply to vesting, lock-in and surplus distribution
- ✦ Rules of final location (i.e., the jurisdiction where member retires or is terminated) used to calculate member's benefits.

**LAWS & ANNOUNCEMENTS cont'd.****Pensions—Supplemental Plans**

Oct. 12: The Régie updated the **standard contract for simplified pension** plans to reflect recent regulatory changes. The revised contract is also interactive.

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

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

**NUNAVUT****LAWS & ANNOUNCEMENTS****Fuel Costs**

Nov. 1: A price cut of 10 cent per litre for gasoline and 5 cent per litre for home heating fuel took effect. The decreases were made possible by the government's decision to pre-purchase 73 million litres of fuel—about 50% of the territory's needs—earlier in the year at lower prices for the 2011 annual resupply. Not all fuel costs are coming down, though. Jet A1 fuel is increasing 10 cents per litre.

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

Oct.: The YWCHSB released its **Strategic Plan 2012-2016** setting out goals for the next 5 years, including:

- ✦ Promotion of integrated safety culture at all workplaces
- ✦ Getting injured workers back to work sustainably
- ✦ Ensuring 100% compliance with legislative requirements.

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

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

**Immigration**

Oct. 24: The government announced a new \$500,000 program to make it easier for members of regulated trades and professions from outside the province to get the accreditation they need to ply their trade on the Island. The program applies to dozens of trades including construction, dentistry, paramedics and even hairdressing.

### Trap 1: Not Explaining Refusal Initiation Procedures

**Trap:** Although work refusals are a key safety protection, they can also tie operations up in knots. To strike an appropriate balance, the OHS laws establish specific procedures that employees must follow to initiate a proper work refusal. Refusal procedures are typically set out in the collective agreement and/or company HR policies. Unfortunately, they aren't always clearly communicated to the front line employees. This breakdown typically causes work refusals to become more disruptive.

**Example:** Most provinces require employees to notify their supervisor that they're exercising their refusal rights and explain the reasons why. But experts tell us that employers often do a poor job of explaining that the supervisor is the go-to guy (or gal). Consequently, refusing employees are apt to simply walk off the job without talking to anyone in a position of authority.

**Solution:** As part of your worker training program, educate and train employees on proper refusal procedures. For example, make sure employees are familiar with and can easily access any forms they have to fill out to initiate a work refusal.

### Trap 2: Not Determining the Basis of the Refusal

**Trap:** To properly respond to a work refusal, you need to know exactly why the employee is refusing work. But employees sometimes offer only vague explanations—and in some cases, no reason at all. Supervisors on the scene may confuse such failure to communicate clear reasons for refusal as insubordination and issue immediate and ultimately unjustifiable discipline exposing the company to liability for reprisals under the OHS laws.

**Example:** An Ontario worker, let's call him Joe, accidentally drops the end of a heavy steel beam he's carrying with a co-worker whom we'll call Fred. The beam falls and misses Fred's foot by a few centimetres. Fred makes a bee line for the supervisor and tells him he refuses to work with Joe ever again. The supervisor doesn't know what happened with the steel beam and Fred doesn't tell him. So he thinks that Fred is just mouthing off and fires Fred on the spot without realizing that he might have a valid safety concern. The company is found liable for improper discipline and ordered to reinstate Fred [*Frankel Steel Ltd.*, [1985] O.L.R.B. Rep. Aug. 1210].

**Solution:** Make sure both employees and supervisors understand that employees must provide a reason any time they refuse work. That reason must be specific and explain exactly why the employee believes the work in question is dangerous. Example:

**Wrong:** "I don't want to use this tool because it doesn't feel right."

**Right:** "I don't want to use this tool because the blade feels loose and isn't attached tightly."

### Trap 3: Not Investigating the Refusal

**Trap:** The most frequent mistake companies make in responding to work refusals is rushing to judgment and dismissing the refusal as laziness or insubordination. Ultimately, that may prove to be the correct conclusion. The point is that it's only acceptable to make that judgment after conducting a proper investigation.

**Example:** A production line supervisor, a burly guy with a reputation for being a bully, has butted heads with a particular employee that we'll call Dave. During their most recent clash, Dave gets so upset that his hands actually start to tremble. "It's unsafe with you standing over me and hollering at me," Dave shouts at the supervisor. "My hands are shaking, and I may slip and cut off a finger." Dave asks for the company's elected safety representative to investigate the refusal, but the supervisor refuses. In his eyes, the refusal is "totally ridiculous." So when Dave keeps refusing to get back to the job, the supervisor suspends him for 2 days.

An Ontario arbitrator rules that the supervisor shouldn't have dismissed the refusal and decided on his own that it was unwarranted. He should have taken the refusal seriously and followed the procedures required by law. So he upholds the grievance and rescinds the suspension [*Lennox Industries (Canada) Ltd. v. United Steelworkers of America, Local 7235*, [1999] O.L.A.A. No. 158, March 3, 1999].

**Solution:** Investigate all workplace refusals, no matter how absurd or ridiculous they may appear. Your investigation doesn't have to be extensive. Exactly what you should look at and who you should talk to will depend on the basis for the refusal. For example, if an employee refuses to use a piece of machinery that he says isn't working properly, you might examine that machine, speak to other workers who recently used it and check the maintenance records. As the *Lennox* case illustrates, not doing any kind of an investigation into a refusal is fatal to your case.

### Trap 4: Dismissing Refusals because Hazard Is Unique to Refusing Employee

**Trap:** Some employees have unique, or at least unusual situations that make conditions particularly hazardous to them. But guess what? Refusals by such employees may be perfectly justified even if the condition triggering them doesn't endanger others doing the work.

**Example:** An unusually tall trucker refuses to drive a small armoured truck because it would be dangerous: his position in the seat leaves precious little room to manoeuvre and makes it hard for him to reach the controls. The employer dismisses his refusal, noting that the truck is in good shape and doesn't pose problems for drivers of *normal height*. The arbitrator determines, properly, that making this tall driver drive this small truck does pose a danger to him [*Garda du Canada Inc. and Syndicat National des Convoyeurs de Fonds*, [2005] C.L.C.A.O.D. No. 39, Sept. 14, 2005].

## RESPONDING TO WORK REFUSALS CONTINUED FROM FROM PAGE 9

**Solution:** Recognize that refusal laws protect all employees, including ones with unique sensitivities or vulnerabilities, such as pregnancy or allergies to chemicals or substances used in the work process. As long as the danger is real, the refusal is justified and you must take steps to accommodate the employee, such as substituting the chemical causing the allergic reaction with one the employee can tolerate.

### Trap 5: Not Notifying & Involving All the Necessary Parties

**Trap:** If employees aren't satisfied with the supervisor's investigation and proposed resolution, they can continue to refuse to work. In this situation, OHS laws typically require you to notify other parties about the refusal and get them involved in investigating and resolving it. Dispensing justice unilaterally without notifying the other affected parties is likely to constitute a violation of not only OHS laws but the terms of your collective agreements.

**Solution:** Make sure you know who has to be notified of continuing refusals under your jurisdiction's OHS laws and that notification is, in fact, properly provided to each of them. Parties that must be notified typically include the company's Joint Health and Safety Committee (or health and safety representative if it's a small company), government OHS officials and inspectors and union representatives.

### Trap 6: Not Paying Employee During Refusal

**Trap:** You may be able to reassign an employee that refuses work to another job until the refusal is resolved. But if reassignment isn't possible, the employee may be unable to do any work at all while the refusal is being investigated. That can be a problem given that investigations may take hours or even days. In most provinces, the employee is entitled to be paid while the refusal investigation is pending.




**Example:** A customs officer refuses to work because of safety concerns. A health and safety officer investigates and determines that there's no danger. So the officer returns to work. The employer refuses to pay the officer for his time during the refusal. The Labour Board rules that the employer violated the *Canada Labour Code*, which bars employers from refusing to pay employees for any period during which they would have been working but for their work refusal and rewards the officer lost wages and benefits [*Ferrusi v. Treasury Board (Canada Border Services Agency)*, [2007] PSLRB 1, Jan. 5, 2007].

**Solution:** Check the OHS laws of your province to see if they require you pay employees while their refusal is being investigated. For a short listing of the rules of each province, go to [www.hrcomplianceinsider.com](http://www.hrcomplianceinsider.com).

### Trap 7: Assigning a Replacement Worker to Do Refused Work

**Trap:** When one employee refuses, it may be tempting to assign another to do the job. But most provinces restrict your right to use replacement employees to do jobs that employees refuse on safety grounds. Failing to comply with such restrictions could expose the replacement worker to a hazard—and your company to liability.

**Solution:** Don't assign a replacement worker to do refused work until you've conducted a preliminary investigation of the refusal and determined that no danger exists. Asking a replacement worker to do the job is generally okay if you:


-  Are reasonably sure the replacement worker won't be exposed to imminent danger;
-  Tell the replacement worker about the work refusal and the reason for it; and
-  Give the replacement worker the opportunity to refuse the work in question after you've provided this disclosure.

### Trap 8: Not Addressing Hazards If Refused Work Is Found Dangerous

**Trap:** Refusal investigations may reveal that the employee was right to be concerned about his health and safety. That's not a loss but a win; it means that you've identified a workplace hazard that might otherwise have resulted in injury. Of course, you then become obligated to take the measures necessary to protect employees against that hazard.

**Solution:** Protecting employees from hazards may include implementing engineering solutions to eliminate or control the hazard, e.g., ventilating a space with dangerous concentrations of airborne flammable or explosive substances, administrative controls to work around the hazard, e.g., not conducting certain operations in combustible spaces and/or the use of personal protective equipment (PPE) to protect employees exposed to the hazard, e.g., mandatory use of respirators.

### Conclusion

Refusals to perform dangerous work can be extremely troublesome if they're not properly handled. The good news is that establishing and implementing proper investigation and response procedures will eliminate the disruption and liability risks. Better yet, getting your refusal response house in order will enable you to identify and correct work hazards before they lead to fatalities, injuries, illnesses and OHS penalties. 

### Insider Says

If you do reassign the employee, most provinces require you to pay him his normal wage, even if the usual pay for the reassigned work would be less.

## PRIVACY

# TEST YOUR HR I.Q.

## Are Images of Employees in Company Videos Private?

### SITUATION

A towing company decides to shoot a promotional video about the firm and the wonderful people who work for it. The video includes segments of employees doing their jobs. One of the employees shown is Cam Rasheye. Nobody forces Cam to be filmed; but nobody asks for his consent either. Cam leaves the company and forgets all about the video. But when Cam discovers that the company has posted the video, including his segment, on its Facebook page, he goes ballistic and files a privacy complaint. Assume the towing company is in a jurisdiction where employees have privacy rights vis-à-vis their employers, e.g., Alberta, BC, federal or Québec.

### QUESTION

#### Did the company violate Cam's privacy?

- A. Yes because Cam didn't consent to being in the video.**
- B. Yes because it didn't take Cam's images out of the video when he left the company.**
- C. No because employees don't have privacy rights in their visual images.**
- D. No because the images of Cam doing his job aren't privacy protected.**

### ANSWER

- D. No privacy violation occurred because the images of Cam in this case aren't personal information protected by the privacy laws.**

### EXPLANATION


Employers often use images of their employees in brochures, videos and other materials promoting their organization. Normally, such images are considered personal information protected by privacy laws. But this scenario, which is based on a recent Alberta case, illustrates an important limitation.

Under the so called "work product" rule, records that employees produce in the course of their employment—including video images—don't count as personal information. Participating in a company video wasn't part of the employee's job duties in this case, the Commissioner acknowledged. But showing Cam doing his job wasn't about Cam personally; it was about the job itself. Consequently, the work product rule applied and Cam had no privacy rights in the video.

#### WHY WRONG ANSWERS ARE WRONG

**A is wrong.** Cam lost because the video images in this case weren't private information. If the Commissioner had found the information privacy protected, not getting Cam's consent would have been a privacy violation.

**B is wrong** because leaving the company had no effect on Cam's privacy rights in the video. But, as a practical matter, taking ex-employees out of your recruiting videos isn't the worst idea, especially if those people left on bad terms.

**C is wrong** because images of employees, including photographs and videos, normally *are* covered by privacy laws. That's why shooting surveillance videos of employees is so problematic. 

#### SHOW YOUR LAWYER

*Double L Towing*, Order P2011-002, File No. P1714 (AB Priv. Commissioner, Sept. 29, 2011)

# DISCRIMINATION

## WINNERS & LOSERS

### Paying Men More than Women for Equal Work

Pay equity laws require that men and women receive equal pay for equal work at the same “establishment.” Of course, you need to understand what an “establishment” is to comply with the rule. That’s not too big a problem if you only have a few employees who all work at the same physical location. But for large companies with multiple locations and employee classifications, defining “establishment” for pay equity comparison purposes can be a nightmare. That’s because, as the following cases show, “establishment” is defined not by geography but by how compensation and working conditions are administered.

#### EMPLOYEES WORK FOR SAME ESTABLISHMENT

##### FACTS

Air Canada flight attendants, who are mostly women, claim that they’re being paid less than mechanics and pilots, who are mostly men, for work of equal value. Air Canada denies the charge. It also claims that comparing flight attendants to mechanics and pilots is apples to oranges because the groups don’t all work in the same establishment.

##### DECISION

The Supreme Court of Canada refuses to throw out the flight attendants’ pay equity claim.

##### EXPLANATION

Although geographically dispersed and represented by different labour unions, flight attendants, mechanics and pilots were all part of the same establishment. Each group was under the airline’s central HR division and subject to the same general wage and personnel policies. So even though the airline negotiated separately with each group, it brought the same basic principles and policies to the table in each negotiation, the Court reasons.



*Air Canada v. Canadian Human Rights Commissioner and CUPE*, 1 S.C.R. 3, 2006 SCC 1, Jan. 26, 2006

#### EMPLOYEES WORK FOR DIFFERENT ESTABLISHMENT

##### FACTS

The Treasury Board does an internal evaluation and determines that employees of its 6 female-dominated occupational groups are being paid less than employees in the 53 predominately male groups doing work of equal value. To rectify the injustice and establish equity of pay going forward, the Board offers equalization payments to employees in the female groups. But the offer applies only to core Treasury Board employees. Employees in the same occupational groups doing similar work for a sister agency, the Public Service Staff Relations Board (PSSRB), aren’t offered the payments because, technically, the PSSRB is a separate employer. The PSSRB employees bring a pay equity complaint.

##### DECISION

The Canadian Human Rights Tribunal dismisses the case without a trial.

##### EXPLANATION

On its face, this case looks a lot like *Air Canada*. The PSSRB and Treasury Board employees belonged to the same occupational classification and did essentially the same jobs. In fact, unlike the flight attendants, the PSSRB employees did work in the same physical location as their Treasury Board brethren—or sistren. But unlike in *Air Canada*, there were 2 employers in this case. And where there are separate employers, there can’t be a single establishment. So, while it might seem unfair, not offering equalization payments to PSSRB employees didn’t violate pay equity laws, the Tribunal rules.



*Harkin v. Canada (Attorney General)*, [2010] C.H.R.D. No. 11, May 17, 2010

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