SISKINDS THE LAW FIRM

LABOUR & EMPLOYMENT LAW 2016 CLIENT CONFERENCE

TAKING CARE OF BUSINESS

Practical Solutions to Today's Workplace Employment Issues

AGENDA

1:00PM **WELCOME AND INTRODUCTION**
Jennifer Costin

1:15PM **THE SIX-MINUTE UPDATE**
Mary Lou Brady, Beth Traynor, Jennifer Costin, and Christopher Sinal

2:45PM **QUESTION PERIOD**

3:00PM **BREAK**

3:15PM **PANEL DISCUSSION—WISH YOU WERE HERE**
Considerations in Developing Attendance Management Programs
Mary Lou Brady and Christopher Sinal

4:15PM **QUESTION PERIOD**

4:25PM **CLOSING**
Beth Traynor

4:30PM **RECEPTION**

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THE SIX-MINUTE UPDATE

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WHAT ARE WE?

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by Jennifer Costin

WHAT ARE WE?

Independent Contractor, Employee or Dependent Contractor

by Jennifer Costin

Organizations and individuals may choose to proceed with their working relationship with the individual characterized as an independent contractor. Regardless of this agreed approach at the outset, courts can reassess the characterization and find the individual was actually an employee, or alternatively that he/she falls within the hybrid category of a dependent contractor. In addition to the courts, other bodies may reassess this characterization, such as the Canada Revenue Agency, CPP and the EI commission.

There is no one single factor that determines which of the three categories the worker falls within. Courts consider any applicable and relevant factors, the weight of which will differ from case to case and tribunal to tribunal. Nevertheless, as each of the following questions is answered, it should become evident whether the "scale" is likely to tip in favour of a finding that the worker is an employee, an independent contractor or in the middle as a dependent contractor. These factors include:

- Is the worker a former employee of the company? If so, is the worker performing the same functions he/she performed as an employee? Does the company have other employees performing work which is the same or similar to services supplied by the worker?

- Has the worker undertaken any risks in the business sense? Is there an expectation of profit (distinct from commission) or risk of loss?

- Does the worker have a business structure and if so, is the worker's business incorporated? Does the business advertise? Does the worker's business have business cards? Does the worker's business have a separate telephone listing? Does the worker maintain office space outside of the company's premises?

- Does the worker have employees of his or her own? Can the worker provide a substitute if the worker is away?

- Is there a written agreement between the company and the worker? If so, does it characterize the relationship as an employment relationship or independent contractor?

- How often or regularly does the worker provide services to the company?

- Is the worker working exclusively for the company? Is the worker free to supply similar services to other companies?

- Does the company provide training to the worker? Are there assessments or performance appraisals of the work done? Is the worker subject to the rules and policies of the company?

- Does the company supply the worker's tools or equipment or does the worker have his or her own tools, e.g., stationery, computer, relevant "tools of the trade"? If supplied by the company, is there a charge?

- What degree of control over the manner of work performed by the worker does the company exercise? Does the company control what work has to be done? When it is done? The manner or method in which the work is done?

- Does the company determine the worker's hours of work? Days of work? Work location? Is there a designated office or work space at the company for the worker?
- Are the services provided integrated into the overall business of the company, e.g., leading to the production of the company's end product?
- Does the worker participate in the company's employee benefits plan? Pension plan? Vacations? Vacation pay? Paid overtime? Does the worker work on statutory holidays?
- Is the worker's time tracked? In the same manner as other employees?
- Is compensation based on the task/project vs. time?
- Does the worker invoice the company? Is HST included?
- How frequently is the worker paid? On the same schedule as employees?
- Does the company deduct and remit income tax for the worker? Deductions and remittances for employment insurance on a worker's behalf? WSIB? Employer health tax?
- Does the company obtain from the worker a Clearance Certificate issued by the WSIB confirming that the worker has registered and paid all WSIA premiums?
- Does the worker provide proof of insurance registration to the company?
- Are expenses reimbursed?
- Who supervises the work? Can the company discipline the worker? Has it?
- How can the relationship be terminated by the company?

A recent case from January of 2016 from the Ontario Court of Appeal, *Keenan v. Canac Kitchens Ltd.*[1] is an important reminder how much courts will lean away from the conclusion of an independent contractor relationship. In this case, Mr. and Mrs. Keenan were spouses who originally began their relationship with Canac as employees installing kitchen cabinetry. Some years later, Canac advised them that they would be treated as independent contractors.

The Keenans thereafter acted as a sole proprietorship, hired and paid their own sub-contractors, provided their own vehicles, were responsible for damage to any cabinetry, obtained their own insurance and were paid gross amounts by piece work by Canac. Canac set the rates to pay to the sub-contractors, but paid the Keenans, who in turn paid their sub-trades. The Keenans supplied their services exclusively to Canac for 22 years and when business slowed, with Canac's knowledge, they began providing 20-34% of their services to another competitor. The Keenans enjoyed employee discounts with Canac, Mr. Keenan received a 20 years of service present, they wore t-shirts with the Canac logos and used Canac business cards.

In March of 2009, Canac advised the Keenans with no notice that it was closing its doors and their services were no longer needed. The Keenans brought an action against Canac arguing that they were dependent contractors and entitled to reasonable notice. The trial judge agreed with the Keenans, as did the Court of

1 2016 ONCA 79 (CanLII)

Appeal. The courts relied heavily on the level of exclusivity that existed between the parties, as well as the view that the Keenans were part of the business organization of Canac and as a result, subject to the control of Canac (what products are sold, when, where and how).

One of the most noteworthy findings of this case is that the courts awarded Mr. Keenan (61 years of age and 32 years of service) and Mrs. Keenan (63 years of age and 25 years of service) notice periods of 26 months!

This case reminds us that it can be costly if a company proceeds on the erroneous assumption that it is engaged in an independent contract relationship. If the worker is found to be an employee, the employer may be required to pay interest or penalties on the income tax that should have been withheld, pay EI, CPP and health tax premiums for what should have been paid, make vacation pay, statutory holiday pay and above all, pay in lieu of reasonable notice for terminating the contract.

ANOTHER ONE BITES THE DUST

Using Probationary Periods When New Employees Don't Work Out

by Mary Lou Brady

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Using Probationary Periods when New Employees Don't Work Out

By Mary Lou Brady

As an employer, do you rely upon probationary periods to terminate newly-hired employees who don't work out, but where you don't have "cause" in the normal sense? Do you rely on your probation language to avoid liability for pay in lieu of notice? If so, would your probationary period stand up to scrutiny by a court? Too many employers believe that simply advising employees when hired that they will have to complete a probationary period is enough. They are often wrong!

The first (and most important) hurdle that an employer must overcome when terminating a probationary employee is to establish the clear existence of a probationary period. Did the employee understand that she would have a probationary period when hired? Did the employee understand the consequences of not successfully completing the probationary period? If not, the employer will be hard-pressed to find a judge willing to uphold a termination of that employee – without notice or pay in lieu – on the grounds of there being a probationary period.

Assuming that the employer can get over the first hurdle, is the employer then free to turf any employee for any reason whatsoever? Of course not…that would be just too easy! While it remains true that employers have a greater degree of discretion in dismissing probationary employees, courts have placed limits on that discretion. Employers are expected to give probationary employees a fair and reasonable opportunity to demonstrate suitability for the position for which they have been hired before they are fired.

So, this said:

What's an employer to do when it comes to probationary periods?

Here is what I generally tell my employer clients:

- Clearly advise the prospective employee in writing that there will be a probationary period. Tell the prospective employer that, during that time, you will evaluate her suitability for full-time employment. Include information on the duration and terms of the probationary period, as well as information on what standards, duties and responsibilities the prospective employee will be expected to meet. Tell the prospective employee how she will be evaluated during this period.

- Clearly advise the prospective employee in writing that, if she is found to be unsuitable for employment during the probationary period, she will be terminated without advance notice or pay in lieu of notice (subject to any overriding statutory termination requirements).

- Ask the prospective employee if she understands, and/or has any questions about, the probationary period. Take detailed notes of any such conversations.

- Never tell the prospective employee that the probationary period is “really a formality” or “not to worry about it” or words to this effect. Good employees rarely refuse employment because of a probationary period, so don’t be afraid to be upfront with prospective employees about your probationary period. Failing to do so will do more harm than good!

- Have the prospective employee agree in writing to the terms of the probationary period as a condition of your offer of employment.

- Keep probationary periods to a reasonable period of time. Unduly short and unnecessarily long probationary periods are not advisable.

- Provide the probationary employee with a fair and reasonable opportunity to demonstrate her ability before you reach any conclusion to dismiss the employee.

- Address concerns with the probationary employee, verbally and in writing, when they arise about her performance during the probationary period. Do not wait until the end. Provide the probationary employee with assistance in improving her performance. Remind the probationary employee that she will be terminated if her performance does not improve.

- Only once the probationary employee has been provided a fair, honest, valid and properly motivated assessment of her suitability for employment can you, as an employer, properly dismiss the employee without cause and without notice or pay in lieu of notice.

THE SAFETY DANCE

Work Refusals Under Health and Safety Legislation

by Christopher Sinal

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Work Refusals under Health and Safety Legislation

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The Ontario *Occupational Health and Safety Act* ("*OHSA*") provides workers with a number of rights, including the right to refuse work that is "likely to endanger" the worker.[1] When a work refusal occurs there are a number of procedures outlined in the legislation that must be followed and, in some circumstances, an inspector from the Ministry of Labour may be required to attend at the workplace to determine whether, in fact, the work could have been performed safely.

When Can Work Be Refused?

Determining whether or not a work refusal is reasonable in the circumstances can sometimes be challenging. The legislation provides no guidance as to what is meant by the phrase "likely to endanger", and there have been few cases unpacking the phrase. However, it is clear that there must be some probability that a danger will arise, and something more than its mere possibility. Further, there must be a substantial risk to a worker's health and safety.[2]

When determining how to respond to a work refusal, employers must remember that the *OHSA* prohibits employers from taking any action against a worker as a reprisal for that worker attempting to exercise his or her rights under the *OHSA*, including refusing work.

However, an employee can be disciplined for unreasonably refusing to work. For example, as recently demonstrated in *Hamilton (City of) v Canadian Union of Public Workers, Local 5167*, 2016 CanLII 9065, a worker cannot use the *OHSA*'s work refusal provisions to simply avoid performing undesirable work. In that case, the City of Hamilton worker was responsible for various maintenance tasks including cutting grass and picking up trash. While on modified duties, the worker refused to work picking up trash due to the fact that his truck did not have an air-ride seat which he said was required by his work restrictions. After the worker failed to attend at work, he was suspended from duties.

During the subsequent arbitration, the arbitrator held that the work refusal was not based on an honestly held belief that the worker's health or safety was in jeopardy, nor was it objectively reasonable. Among other things, the worker had not contacted the Ministry of Labour until two months after the alleged work refusal, and after the WSIB had determined that the work that he refused was appropriate given his restrictions. Also, the worker had frequently been assigned a vehicle without air-ride seats in the past and had not objected. As a result, the arbitrator found that the work refusal was motivated by the worker's dislike of the work assignment rather than fear for his health and safety and upheld the suspension.

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1 Note: a worker may not refuse to perform work where the danger is inherent in the worker's work or is a normal condition of the worker's employment; or when the worker's refusal to work would directly endanger the life, health or safety of another person.

2 *Hardwall Construction Ltd.*, [2011] O.O.H.S.A.D. No. 60

Take Home Points

Where a worker engages in a work refusal, employers must investigate the situation in the presence of the worker (and the worker safety representative) on the assumption that the refusal is made in good faith. Discuss the situation with the worker and attempt to resolve the situation (if possible).

If an employer suspects that the basis of the work refusal is unreasonable (i.e. it is not probable that a danger will arise, there is no substantial health and safety risk, etc.), the employer should carefully document the surrounding circumstances and the basis for its opinion, and consider contacting the Ministry of Labour for an assessment. Although there are certainly risks associated with inviting the Ministry into the workplace, doing so may avoid future litigation in the event that the employer disciplines the employee for failing to perform work and is the subject of a reprisal complaint or grievance.

MEAN GIRLS

Bill 132 and the OHSA

by Beth Traynor

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It has been six years since Bill 168 amended Ontario's *Occupational Health & Safety Act* to require employers to take steps to prevent and to deal with bullying and harassment in the workplace. Since that time, we have come to realize that there were gaps – some would say flaws – in the legislation which reduced its impact. Those gaps are now being addressed by *Bill 132, Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)* 2016.[1]

What Were the Gaps?

- **Legal Obligation to Protect**
  Bill 168 imposed no specific obligation on employers to protect employees from harassment and violence in the workplace.
- **Sexual Harassment or Violence**
  Bill 168 did not specifically include sexual harassment or violence.
- **Investigations**
  Bill 168 did not require employers to conduct investigations.
- **Remedies**
  While Bill 168 clearly required employers to develop, implement and train employees on policies and programs to deal with workplace harassment and violence, there was no authority given to the Ontario Labour Relations Board to enforce a remedy in the event harassment or violence occurred.

How Are the Gaps Being Filled?

The definition of workplace harassment has been amended to specifically include workplace sexual harassment, which is defined as:

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
>
> (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

The remainder of Bill 132's amendments to the OHSA related to all types of harassment. When the amendments come into effect on September XX, 2016, employers will be required to:

- protect their employees from workplace harassment

1 Bill 132 affects a number of statutes, however we will address only the amendments to the OHSA.

- together with the joint health and safety committee (or the health and safety representative) develop and maintain a written program to implement the harassment policy, which must include:
- information about reporting harassment to individuals other than the alleged harasser, if the harasser is the employer or a supervisor;
- a stipulation that information about an incident or complaint will not be disclosed unless necessary for the purposes of the investigation or as required by law;
- confirmation that both the alleged victim and the alleged perpetrator will be informed in writing of the results of the investigation and any corrective action taken.
- review the program annually
- undertake an investigation into a complaint of workplace harassment that is "appropriate in the circumstances". Inspectors will have authority to order a third party investigation if deemed necessary. Note that employers have an obligation to investigate even where the alleged victim does not wish to pursue the matter.

The government has indicated that it will issue a Code of Practice in July 2016 and we anticipate that this document should provide employers with some assistance in determining how to comply with these new obligations. Compliance will be important, as the Ministry has hired 12 new inspectors who will receive specific training on dealing with workplace harassment complaints.

Keep in mind that occupational health and safety legislation is quasi-criminal in nature and that penalties imposed by the Court can be substantial. Individuals can be fined up to $25,000 and/or be imprisoned for up to 12 months. Corporations can be fined up to $500,000.

Finally, on a positive note, Bill 132 includes one additional provision which codifies existing case law and which should please employers:

> A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

THE VIRTUAL OFFICE

Working from Home Considerations

by Jennifer Costin

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by Jennifer Costin

With the advancement of technology, employers looking to cut overhead costs, and family and lifestyle accommodations growing, working from home is becoming more and more common. However, there are some considerations that must be explored before such practices are approved.

Policies

If employers are considering engaging in a telecommuting arrangement, a clear policy should set out the expectations of the employer in terms of:

- hours of work per day or week
- how to monitor work product and deadlines
- any obligations to attend meetings at the employer's premises
- whether the arrangement is temporary, permanent and whether there is an option to relocate the employee back to the employer's premises
- where the office space is located within the home
- measures to ensure the preservation of confidential information
- whether appropriate home office insurance is in place and by whom
- liability issues

Insurance, WSIB and OHSA

The alternate work site (i.e. the employee's home) should be adequately insured. Most general liability insurance policies will cover telecommuting, but employers should consult their insurers to be certain. Additionally, employees should consult their home insurance policy.

The *Workplace Safety and Insurance Act* applies and covers employees who are involved in a telecommuting arrangement. Employers are still required in a telecommuting scenario to take every reasonable precaution to protect workers. As a result, the employer should satisfy itself that the proposed work space is adequate, safe and conducive to productive work. Hazards with telecommuting tend to be related to adequate and safe office space and the ergonomics related to computer use. The Ministry of Labour has issued a guideline that is useful for ergonomics, titled Computer Ergonomics: Workstation Layout and Lighting | Health and Safety Guidelines.

The *Occupational Health and Safety Act* also applies to telecommuting arrangements. However, an inspector does not have the right to inspect a private residence. Having said that, an agreement in advance between the employer and employee allowing a representative of the Joint Health and Safety Committee is recommended.

If an accident or injury arises during the course of a telecommuting employee's employment, it must be reported to the proper authorities, just like any accident in the workplace. Accident and injury investigations must follow the normal procedures.

Office & Equipment

The office space within the employee's premises should be understood and work limited to that area. This assists the employer with understanding the area that it has responsibility for and helps set boundaries for when an employee is expected to work. Further, keeping confidential information secure is easier when the work is limited to a specific area in the home. Best practices include a space that can be locked, devices that require a password to access them, keeping computers locked and logging out of programs to prevent access by a third party, and the ability to secure confidential paper information in a filing cabinet, locked drawer, etc.

It should be clear who owns the equipment being used in the employee's residence and in addition, who is responsible for maintenance and the cost of maintenance of the equipment and the return of that property at the end of the relationship.

Intellectual Property

Policies should also cover who has rights over the information contained on the computer equipment if, for example, it is the employee's computer. Software license agreements should also be given consideration.

Many employers are finding that they need to adapt to changing times, but proper forethought and planning will help offset any unexpected liabilities that may arise with these arrangements.

BORN THIS WAY

The Transgendered Employee

by Mary Lou Brady

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The Transgendered Employee

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Less than four years ago – in the summer of 2012 – gender identity and gender expression were added to Ontario's Human Rights Code ("Code") as protected grounds of discrimination. I spoke about that new development at our 2013 L&E Client Conference. This paper should be read in conjunction with my materials from that conference, which can be located online at: Gender Expression and Gender Identity: New Protected Grounds of Discrimination

So where are we now?

- Since 2013, there have been a handful of new decisions by the Human Rights Tribunal of Ontario ("HRTO") involving gender identity and gender expression. While only one alleged discrimination in the workplace, the others are nonetheless instructive of the HRTO's approach when handling complaints on these prohibited grounds.
    - Salsman v. London Sales Arena Corp.[1]
    - McMahon v. Wilkinson[2]
    - T.A. v. Ontario (Transportation)[3]
    - Browne v. Sudbury Integrated[4]
    - Lewis v. Sugar Daddys Nightclub[5]

- In January 2014, the Ontario Human Rights Commission ("OHRC") released its updated Policy on Preventing Discrimination because of Gender Identity and Gender Expression.

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1 2014 HRTO 775 (CanLII), involving discrimination and reprisal against three transgendered persons who tended a retail booth that sold candles at Trails End market and against the owner of that booth by virtue of her association with the three transgendered persons. The owner was told that she was not welcome at the market if she allowed the transgendered persons to operate her booth.

2 2015 HRTO 1019 (CanLII), involving discrimination in housing against a same-sex couple, one of whom was a trans woman, on the basis of gender identity and sexual orientation. The potential landlord made discriminatory statements and refused to rent to the applicants, at least in part because of those prohibited grounds of discrimination.

3 2016 HRTO 17 (CanLII), involving a person who identifies as pan-gendered (i.e. gender-neutral) and who disputed the use of binary gender designations (i.e. only male and female) on government-issued identity documents.

4 2016 HRTO 62 (CanLii), involving a cisgender employee who disputed his employer's clean shaven policy that prohibits the wearing of certain beards that may interfere with the fit of respirator masks required for work, on the basis that such policy interfered with his gender expression.

5 2016 HRTO 347 (CanLII), involving a transgender neutral questioning transgender male who was subjected to verbal and physical assaults by two security guards when forcibly removed from a nightclub after using its male washroom.

The policy sets out some key terms relating to the concept of gender:

> **Gender identity** is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.
>
> **Gender expression** is how a person publicly presents their gender. This can include behavior and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes.
>
> **Trans** or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans male (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant and gender queer.
>
> **Lived gender identity** is the gender that a person feels internally and expresses publicly in their daily life, including at work, while shopping or accessing other services, in their housing environment or in the broader community.

- The OHRC has also developed the following Best Practices Checklist for preventing discrimination because of gender identity and gender expression:

> **<u>Privacy and Confidentiality</u>**
>
> - Maximize privacy and confidentiality of any information related to a trans person's gender identity, or to the extent the trans person wishes. This includes information that directly or indirectly identifies that a person's sex is different from their gender identity.
> - Keep a person's transgender history and medical information private and confidential, and limited to only relevant information and people directly involved in helping to meet the person's needs.
> - All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system to protect the person's confidentiality.
>
> **<u>Identification Documentation and Records</u>**
>
> - Recognize a trans person's preferred name and gender in all administrative systems and documents (including hard copies and electronic).
> - Show how any requirement for a person's 'legal' name and gender is legitimate (reasonable and bona fide) in the circumstances.
> - Undertake system reviews to identify how electronic databases, IT systems and other relevant information processes can be modified to recognize a person's chosen name and gender when it does not match legal documents.

Collecting Data on Sex and Gender

- Consider whether there is a legitimate need to ask for and collect information about sex/gender. If yes, provide options beyond the binary of male/female or man/woman.
- To the greatest extent possible, allow people to self-identify their sex or gender identity. The option of a blank box, for example, is the most inclusive.
- Protect any information indicating transgender status as confidential.

Dress Code Policy

- Do not base it on gender stereotypes, and apply it consistently to all people, regardless of their gender identity or expression.
- Make it inclusive of trans people, and identify that everyone may dress in accordance with their lived gender identity or gender expression.

Washrooms and Change Facilities Policy

- Recognize the right of trans people to access facilities based on their lived gender identity.
- Communicate that a trans person will not be required to use a separate facility because of the preferences or negative attitudes of others.
- Make clear that accommodation options will be provided on an individualized basis, if a trans person requests.
- Provide privacy options that anyone in a change room may choose to use.
- Provide information on where people can find accessible, all-gender washrooms.

Organization Gender Transition Guidelines

- Guidelines should be in place before a transitioning employee comes forward. They provide clear direction for managers on how to generally help transitioning employees, while still recognizing the obligation to take the individual's needs into account. This sends a signal to everyone that transitioning employees will be supported.
- Guidelines should address:
    - A lead contact person to assist the transitioning employee;
    - What a transitioning employee can expect from management;
    - Expectations of management and other staff, transitioning employees in facilitating a successful workplace transition; and
    - Related policies and practices for assisting with the transition process, such as: washroom policies, dress code policies, confidentiality and privacy, recognizing the person's new name in documentation and records, anti-harassment policies, dealing with any individual accommodation needs as well as training for management, staff and clients.

Individualized Gender Transition Accommodation Plan

- Working together, the employee, employer and union representatives (where the employee has asked for their involvement) may wish to create a transition plan to address what, if any, accommodations may be needed in the workplace related to the steps the employee is taking in the transition process.
- Each trans person's situation will vary, and an individualized transition plan will make clear what steps will be taken given the needs of the particular employee.
- It can be useful to discuss timelines and dates when the employee would like to:
  - Be addressed by their new name and new pronoun;
  - Begin expressing their gender identity through clothing, in keeping with the workplace dress code;
  - Use washroom and other facilities in their lived gender identity; and
  - Be able to take time off work for any medical treatments related to their transition, if needed.
- The plan should also address:
  - When and how any related employment records, documents and databases will be updated to reflect the person's new name and gender (e.g. human resources and administrative records, email and phone directories, business cards, etc.)
  - If, when and how other employees and clients will be informed of the person's new name and gender identity;
  - Anti-harassment planning – a simplified process to deal quickly and effectively with any harassment the transitioning employee may experience;
  - When and how training for other employees, clients or managers will be provided to help them understand the transition process, if appropriate; and
  - How management and the union will show support for the transitioning employee.

- Other excellent resources exist on-line to assist employers to understand and handle transgender and non-gender-conforming situations in the workplace, including sample transgender policies and workplace transition plans. Examples can be found at the following links:
  - TD Workplace Gender Transition Guidelines
  - City of Toronto's Guidelines for Accommodating Gender Identity and Gender Expression
  - Canadian Labour Congress' Workers in Transition: A Practical Guide about Gender Transition for Union Representatives
  - Transgender Law Center's Model Transgender Employment Policy - Negotiating for Inclusive Workplaces

- Most recently, on May 17, 2016, the Liberal Government introduced Bill C-16, An Act to Amend the Canadian Human Rights Act and the Criminal Code. If passed, such legislation will add both gender identity and expression to the list of prohibited grounds of discrimination for federally-regulated employees. It will also amend the Criminal Code to extend the protections against hate propaganda to any section of the public that is distinguished by gender identity or expression and, further, to clearly set out that evidence that a Criminal Code offence was motivated by bias, prejudice or hate based on gender identity or expression will constitute an aggravating circumstance that a court must take into consideration when it imposes a sentence.

In closing and at the risk of overstating things, it appears to me that, as a society, some real progress has been made over the last 4 years towards better understanding – and hopefully accepting – transgender and non-gender-confirming persons, both inside and outside of the workplace.

There is obviously still more progress that must be done and, as employers, you will need to be prepared to handle these complex workplace issues in compliance with your Code and other legal obligations.

EVERY BREATH YOU TAKE

When are Employers Able to Question Medical Certificates?

by Christopher Sinal

EVERY BREATH YOU TAKE

When are Employers Able to Question Medical Certificates?

by Christopher Sinal

Where an employee is absent due to an injury or illness, employers are generally entitled to request a medical certificate to substantiate the absence. This is particularly the case where the employee is attempting to claim benefits under a sick pay scheme (often in a unionized environment). In such circumstance, the onus is on the employee to demonstrate that she was absent from work because of an illness or injury that rendered her unfit for work.

It is important to note that labour arbitrators have typically found that employees do not need to provide significant detail in substantiating their absence; rather, they must only provide a basis for the absence and a prognosis. There are very few circumstances where an employer is entitled to information regarding an employee's diagnosis or medical treatment. Generally, this type of more detailed enquiry will only be permitted where the employer has reasonable concerns about sick leave abuse, where the employer is required to deal with return to work issues or where a communicable disease is involved. Further, the onus for an employer to demonstrate such a need is stringent.

Despite the difficulty an employer faces in seeking more detailed medical information, some decision makers are beginning to recognize that doctor's notes should not necessarily be given unquestioning deference.

For example, in *CUPE, Local 966 v. Caledon (Town)*,[1] the grievor presented the employer with a note from his family doctor that simply stated that he had to be placed on stress leave without any further explanation. After assessing the medical information submitted by the grievor, the arbitrator held that the paperwork prepared by an employee's family doctor was open to question, citing an earlier decision that stated:

> In the ideal world, doctors would have perfect knowledge of the relevant medical matters, their patients and their patient's workplaces, and would be completely objective. If that were so, a doctor's simple statement certifying that an employee was ill and unable to work...would be good enough...The fact is that they are not always entirely objective. It is quite appropriate for medical health professionals to act as advocates for their patients in medical matters within their competence, but not when advocacy extends beyond their medical expertise or to matters which they have no direct knowledge, such as when they have little or no knowledge of the workplace or their patient's job or employment situation other than what their patient decides to tell them.[2]

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1 *(Deforest Grievance)*, [2008] O.L.A.A. No. 388 (MacDowell).

2 *Hamilton Health Sciences & Ontario Nurses Association*, (2007) Canlii 7388 (Surdykowski) at para 40.

Similarly, in *City of Brampton and CUPE Local 831*,[3] the arbitrator emphasized that arbitrators must critically examine medical notes, stating:

> In the "real world", a busy family physician may not be fully informed about the employment context and may not probe the truth or completeness of what s/he is being told by the patient; nor may s/he be inclined to express an opinion that is contrary to that patient's wishes.

These cases suggest that there may be an increasing openness to questioning a physician's medical conclusions, particularly in the case of family physicians with extremely busy practices. However, employers should refrain from engaging in such questioning or requiring employees to participate in independent medical exams unless there are other reasons to question the accuracy of the medical opinion (for example, pattern absenteeism or Facebook posts of the employee riding a rollercoaster).

3 [2008] O.L.A.A. No. 359 (MacDowell).

LET ME IN

Update on Accessibility for Ontarians with Disabilities Act (AODA)

by Beth Traynor

LET ME IN

Update on the Accessibility for Ontarians with Disabilities Act ("AODA")

by Beth Traynor

The AODA was passed in 2005, with the goal of creating a fully-accessible province within 20 years. The implementation of the legislation has been staged and, because the staging is different for different sizes and types of organizations, the rules are quite complex. Today we will be discussing only the workplace related requirements, but we remind you that there are many other obligations under the AODA. Several deadlines have already passed and if you have not already done so, you should ensure that your organization is meeting its obligations.

Here are the links where you can find full information for all of the various types of organization.

- Businesses & Non-Profits
- Educational Institutions
- Libraries
- Municipalities
- Public Sector Organizations

Employment Standards Under the AODA

Regulation 191/11 of the AODA includes specific Employment Standards (not to be confused with the *Employment Standards Act, 2000*) with which organizations must comply on the following schedule:

  - Large organizations (50 employees or more) = January 1, 2016
  - Small organizations (1- 49 employees) = January 1, 2017

AODA Employment Standards affect every stage of employment, from recruitment through hiring, accommodation and career development. For example:

All organizations

- notify applicants of availability of accommodation during recruitment
- provide accommodation through interviews and testing
- advise successful applicants of availability of accommodation during employment
- provide all materials in accessible formats at all stages
- provide individualized emergency response information to disabled employees and, if the employee consents, share the information with co-workers who may be required to assist in an emergency
- take into account accessibility needs and accommodation plans (where they exist – see below) when using performance management

- take into account accessibility needs and accommodation plans (where they exist – see below) when providing career development and advancement plans
- take into account accessibility needs and accommodation plans (where they exist – see below) when reassigning employees

Large organizations only

- develop individual accommodation plans for disabled employees. These plans must address how the individual will participate in the development of the plan, how privacy will be protected, how frequently the plan will be reviewed and updated, how a denial of accommodation will be communicated, and how the plan will be provided in an accessible format
- develop a return to work process for individuals after an absence from work due to a disability

Enforcement

All deadlines have passed for the training of employees in the Customer Service Standard and the Integrated Accessibility Standards, which all employers are required to do. Large employers also have obligations to file Compliance Reports and one deadline for doing so has already passed. According to a Toronto Star report in December 2015, 58% of organizations had not met their obligation to file Compliance Reports in 2014.

In October 2015, the Ministry of Economic Development, Employment and Infrastructure triggered an enforcement blitz targeting very large retail organizations with more than 500 employees to ensure compliance with the obligations in effect as of January 1, 2015. The results of the blitz are not yet available, but it is safe to assume that many compliance orders would have been issued. It is unknown whether monetary penalties were imposed, but the potential liability is significant. If found guilty of non-compliance:

- Individuals and unincorporated organizations can be fined up to $50,000/day
- A corporation can be fined up to $100,000/day
- Directors and officers of a corporation can be fined up to $50,000/day

Recommendations for Compliance

We expect that the Ministry will continue to take enforcement seriously. Given the potential liabilities, organizations should immediately take steps to bring themselves into compliance. Here are some suggestions to get started:

1. Review the AODA and confirm the timeline for compliance which applies to your organization.
2. If you have missed deadlines, focus on getting the organization into compliance as quickly as possible.
3. Review your job postings, offer letters, employment contracts, policy manuals, etc. and add references to the availability of accommodation if not already included.
4. Train managers on the need to specifically consider accommodation requirements when conducting performance reviews, discussing career development, or undertaking performance management.
5. For large organizations, develop a process to create individualized accommodation and return to work plans.

COMFORTABLY NUMB

Medical Marijuana in the Workplace

by Christopher Sinal

COMFORTABLY NUMB

Medical Marijuana in the Workplace

by Christopher Sinal

Traditionally, Canadian courts and arbitrators have upheld discipline against employees who have disobeyed company policies by using or possessing marijuana[1] on company premises. There has generally been no need for the employee to have engaged in dangerous conduct, so long as the employee's use of marijuana occurred on company property. However, the potential legalization of marijuana has received significant media attention in recent months, and many employers have expressed concerns about the effect this legislative change may have on the workplace, particularly if it increases the use of marijuana to treat medical conditions.

Management of Medical Marijuana Use at Work

In Canada, individuals holding valid authorization to possess dried marijuana for medical purposes are wholly exempt from criminal liability under the *Controlled Drugs and Substances Act ("CDSA")*. As a result, those employees are treated like other employees using prescription narcotics that may have negative side-effects and are governed by "fit for work" policies prohibiting employees from attending work under the effects of drugs (prescription or otherwise) or alcohol.

Employers should note that human rights tribunals, courts and arbitrators are likely to view employees using medical marijuana just as they would any other individual using a prescription drug to treat an underlying illness that may constitute a "disability". As a result, employers will be under an obligation to accommodate such employees to the point of undue hardship.

However, arbitrators and courts have generally upheld policies that require employees to be "fit for work" and free from the effects of drugs, alcohol, or prescription medication sufficient to impair their capacity to perform their duties. Valid policies respecting the use of prescription medication often contain a "self-reporting" mechanism, whereby employees consult with their attending health care professional as to whether their prescribed medication may result in any side effect and, if so, whether those side effects may impair work performance. Importantly, the medical use of dried marijuana does not require a medical prescription, *per se*; this is a fact that may be relevant given the wording of some "fit for work" policies. Employees who fail to report possible side effects of medication may be subject to discipline, including termination.[2]

Determining How to Properly Accommodate Employees Using Medical Marijuana

Even though an employee may be "fit for work", that individual's use of medical marijuana may nonetheless pose problems that would not occur with traditional medications. For example, where an employee must use marijuana during working hours, there is a potential that the individual will smell of cannabis afterwards. As a result, the company may have an interest in protecting its public image that could be negatively affected by the appearance of an employee using marijuana during working hours, even though the employee may not

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1 Also known as weed, pot, ganja, dope, Maryjane (or MJ), herb, the bubonic chronic, fatty boom blatty, etc.

2 See, for example, *Royal Columbian Hospital v. British Columbia Nurses' Union (Anderson Dismissal)*, [2003] B.C.C.A.A.A. No. 361 (Gordon).

be impaired and may be using the drug legally. There is some precedent to suggest that limiting an employee's interaction with the public in such circumstances would not be unreasonable[3].

In the event that an employee cannot safely perform his duties due to his use of medication, or that the employee cannot work with the public while using marijuana, the employer must attempt to accommodate the employee's underlying disability to the point of undue hardship. The employee's accommodation should be addressed through the company's established protocol for addressing disability and accommodation issues, and any accommodation efforts should address both the employee's use of marijuana, and the underlying disability that the employee is treating.

3 See, for example, *Re Bosal Inc. and C.A.W.-Canada, Local 1837* (2005), 136 L.A.C. (4th) 437).

CAN WE TAKE A BREAK?

The What and How of Layoffs in Ontario

by Jennifer Costin

CAN WE TAKE A BREAK?

The What and How of Layoffs in Ontario

by Jennifer Costin

Layoffs are an area of employment law that causes confusion for many employers (and employees!) in Ontario.

Ontario's employment standard's legislation, the *Employment Standards Act, 2000* ("ESA"), provides a scheme and rules for Ontario employers looking to temporarily lay their staff off. This scheme leads some to assume that, as long as you are compliant with the rules under the ESA, employers are safe when laying staff off. Unfortunately, the common law does not view layoffs the same way. Unless the right by the employer to lay the employee off has been agreed to, the employer may face a claim of constructive dismissal. If the workforce is unionized, the collective agreement will regulate the availability and details of any layoff.

The ESA Layoff Scheme

The ESA allows employers to place employees on unpaid temporary layoffs for certain maximum periods. Employers can place employees on a temporary layoff of not more than 13 weeks in any period of 20 consecutive weeks. However, this period can be extended to less than 35 weeks of layoff in any period of 52 consecutive weeks, where the employee continues to receive substantial payments from the employer. "Substantial payments" include:

- continuation of payments under a group or employee insurance plan (such as a medical or drug insurance plan) or a retirement or pension plan;
- the employee receives supplementary unemployment benefits; or
- the employee would be entitled to receive supplementary unemployment benefits but isn't receiving them because he or she is employed elsewhere.

Under the ESA, the employee is deemed to be laid off (in circumstances where there is a regular work week) where the employee is only given work that amounts to less than half of the amount she would normally earn.

Where the employer fails to recall the employee to work within either the 13 or 35 week period, the employment relationship is automatically considered to be "terminated" and/or "severed" as of the first day of the layoff, entitling the employee to pay in lieu of notice and severance (if applicable) under the ESA.

The Common Law

A very different analysis is applied by the common law. Under the common law, employers do not have the automatic right to place employees off work on unpaid temporary layoffs, unless there is (ideally) an express term (e.g. verbal or written agreement by employee) or (second best approach) an implied term (e.g. employee notified or warned of possible unpaid temporary layoffs; employee placed on temporary layoffs in past; employee aware of temporary layoffs in past of employees in same or similar positions; established industry practice of temporary layoff; temporary layoff policies; etc.) to allow the employer to impose the layoff.

If there is no such agreement by the employee to be placed on a temporary layoff and the employer proceeds with the layoff, the common law views the employer as having created a unilateral and fundamental change to the employment relationship (i.e. no work, no pay). As a result, a non-unionized employee may — often through her lawyer — take issue with the temporary layoff, claiming constructive dismissal and demanding a termination package.

As employers, how do you address this right you want to preserve for yourself down the road, should business needs require temporary layoffs? A clause can be included in your employment contracts, such as:

> Although we hope that it will not be necessary, we reserve the right to temporarily lay you off from your employment, in accordance with the *Employment Standards Act, 2000*, as amended from time to time. A temporary layoff will not be considered a termination of your employment unless it is deemed to be one under the *Employment Standards Act, 2000*.

It is important to keep in mind that your clause must not allow for layoffs of indefinite duration, or of a duration greater than otherwise permitted by the ESA, as it will be null and void. The result is that the agreement is left without a term allowing for any layoff at all and, as such, the employee could claim successfully constructive dismissal as of the first day of the layoff.

Also of note is that workers who have been hired to complete a task or a term (e.g. seasonal workers) will have their employment automatically expire at the end of the task or term and therefore layoffs will not be needed and no termination pay or severance pay will generally be owed. Of importance is documenting this employment agreement.

Are employers prevented from laying non-union employees off during slow times? Not if you take appropriate measures to incorporate the employee's agreement to such layoffs into the employment contract.

CAN'T TOUCH THIS—OR CAN I?

Terminating Employees on Job-Protected Leaves

by Mary Lou Brady

CAN'T TOUCH THIS—OR CAN I?

Terminating Employees on Job-Protected Leaves

By Mary Lou Brady

New job-protected leaves have been added to Ontario's Employment Standards Act, 2000 (the "ESA") at an ever-increasing pace over the last 15 years. Even now, a private member's bill referred to as Jonathan's Law would, if passed, add a new Child Death Leave to the ESA, permitting parents to take up to 52 weeks of bereavement leave when a child dies.[1]

Employers sometimes call me expressing concern about such leaves. Business conditions have changed. Performance concerns have arisen. Employers need flexibility to make legitimate business decisions, which might mean terminating employment of an individual on a job-protected leave, or who is about to go off, or who has just returned from, such leave.

At the heart of the concern is the question:

Can I terminate an employee who is on a job-protected leave?

Here is what I generally tell my employer clients:

- Being on a job-protected leave does not give employees unlimited job security. Employees cannot be treated worse because of such leave. Employees are also not entitled to be treated better.

- Consider the "but-for" test. Can you truthfully answer "yes" to the question: "But for the job-protected leave, would the employee's employment have been terminated?" If you cannot, then the termination is likely unlawful.

- Consider the "taint theory". I explain it to clients like this: You buy a gallon of white paint from the local hardware store. If even one drop of black paint is added to the gallon of white paint, it's no longer white. It is tainted. Similarly, you may have many legitimate reasons for terminating an employee's employment. If even one smallest part of those reasons has anything whatsoever to do so with an unlawful reason – such as the employee's absence (past, present or future) on a job-protected leave – then the entire decision to terminate is tainted. It is unlawful.

- Sometimes it is clear that the termination reasons are related to the leave. Other times, it is not so clear. Pay careful attention to situations that, on their face, appear lawful – yet only come to your attention because of the leave. For example, the replacement employee identifies that the employee now on leave was not properly performing her work duties before the leave and, because of this information, you want to terminate for poor performance. Or you identify, because of how the employee's work duties were handled during her leave, that you want to eliminate the employee's position as it is not needed and, as a result, terminate her employment.

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1 Bill 175, Jonathan's Law (Employee Leave of Absence When Child Dies), 2016 passed first reading on March 8, 2016.

- Consider the best time to make the termination effective. Is it before the job-protected leave starts? While the employee is on the leave? Or after the employee returns to work? My preference, whenever reasonable, is to delay the termination until the end of the leave. This allows the employee the full benefit of the leave, including any associated benefits (e.g. group benefits coverage; employment insurance benefits). Such approach is generally most acceptable to employers: (a) when terminating employment on a without cause basis; and/or (b) when they will incur little cost to continue employment until the end of the leave.

- Consider the best time to notify the employee of the termination. No one wants to ruin an employee's time off work on a job-protected leave. At the same time, surprising an employee on her first day back with an immediate termination seems unkind. My preference, again whenever reasonable, is to notify the employee of the pending termination while she is still on leave. This is especially so when the employee may hear about the termination from other sources (e.g. in the case of a downsizing or restructuring). Such approach allows the employee to plan for the termination (e.g. starting the employment search; different childcare arrangements; etc.) and may ultimately decrease termination costs.

- Communicate the termination decision in a manner that reduces potential liability. My preference is to be upfront in the termination letter. Briefly explain the reason for the termination decision. Consider including "While we recognize that the timing of the termination is not ideal and may cause you concern, we wish to assure you that the termination decision has been made for legitimate and lawful business reasons, wholly unrelated to your leave and/or the reasons for that leave." or words to this effect.

- Recognize that terminating an employee on a job-protected leave can be expensive. Employees are more likely to challenge terminations that occur when an employee is on a job-protected leave, or after the employee has announced an intention to take, or has recently returned from, such leave. Broad remedies exist when such terminations decisions are found to be unlawful (e.g. reinstatement with back pay; general damages for pain and suffering; etc.). Even when lawful, termination costs can still be higher if the timing of the termination impacts on the employee's ability to find comparable replacement employment (e.g. an employee terminated when 7 months' pregnant). Of course, this also often translates to more time and more legal fees being incurred by the employer.

- Be prepared for a potential challenge of the termination decision. Gather together any records you have to prove that the employee's employment was terminated for lawful reasons, wholly unrelated to the job-protected leave. As always: Document! Document! Document!

Ultimately, as the employer, it is not a matter of whether you can or cannot terminate an employee. It is really about whether you can lawfully do so and, when it comes to job-protected leaves, understanding the increased risks that you may face and taking appropriate steps to reduce those risks.

Of course, each situation is unique and all relevant factors should be carefully considered. Terminating an employee on a job-protected leave is one situation where we strongly recommend that you consult, in advance, with employment counsel.

BREAKING UP IS HARD TO DO

Conducting Termination Meetings

by Beth Traynor

BREAKING UP IS HARD TO DO

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Contrary to what some employees may believe, most employers think long and hard before making the decision to terminate. There's a good reason for this caution - terminations can be costly and painful for both employer and employee. This can sometimes cause employers to make poor decisions about how to conduct the termination meeting, with dire consequences.

Using the "Berenstain Bears" approach ("Little Bear, this is what you should NOT do"), here are my suggestions for handling this admittedly difficult situation with dignity and kindness.

- DO NOT lie. For example,
    - If the termination is permanent, don't call it a layoff, leaving the employee with hope that she will be recalled.
    - If performance issues are the reason for the termination, don't say it's shortage of work.
- DO NOT become engaged in a debate. Employees likely won't agree that their employment should be terminated, and employers likely won't change their minds about the termination decision, so there is no benefit in belabouring the point.
- DO NOT hold the meeting where others can see you. Find a private spot, off-site if necessary, to give the employee privacy in which to respond to the termination.
- DO NOT prolong the meeting. The employee is not going to absorb much information once you say he is being terminated, so provide a detailed termination letter which can be read and considered once the employee has a chance to recover from the initial shock.
- DO NOT say things which are inconsistent with the termination letter. Use the termination letter to put together a general outline of what you're going to say, but don't read it word-for-word to the employee.
- DO NOT hold the meeting late in the day or on a Friday if the employee seems vulnerable, fragile or without social/family supports.
- DO NOT require the employee to pack up his office immediately. Offer options, which could include returning later to pack things; taking some personal items immediately; returning after-hours or at the very beginning or end of the day; etc.
- DO NOT ignore the termination in the broader workplace. Communicate respectfully with other employees without sharing the employee's personal information. For example, "John Smith is no longer with the Company. We know you will join us in thanking him for his past service and wishing him all the best in his new endeavours."

Obviously, each situation will require careful attention to its specific facts. These suggestions may not be appropriate for every termination meeting, but careful forethought about the optimal approach should reduce an employer's liability. It may also reduce the stress and emotional discomfort inflicted on both sides during the termination meeting.

UP, UP, AND AWAY

What's New with Notice Periods

by Jennifer Costin

UP, UP, AND AWAY

What's new with Notice periods?

by Jennifer Costin

Unfortunately for employers, there is a fair bit new with notice periods and not in a welcome direction. While 24 months has typically been viewed as the upper end of reasonable notice periods, there have been a number of decisions recently which has challenged that assumption.

In *Markoulakis* v. *Snc-lavalin Inc.*[1], the court awarded a reasonable notice period of 27 months. The Plaintiff was a 65 year old Civil Engineer, with 40.66 years of service. His employment was terminated due to shortage of work. He had only ever worked for the employer.

Similarly, in *Maasland* v. *City of Toronto*[2], the court awarded a 26 month notice period in a constructive dismissal scenario. The Plaintiff in this case was 57 years of age and testified that she intended to retire at age 61. She had a length of employment of 25 years and held a management position in her role as Divisional IT manager. The court also found that she was a specialist and highly experienced and qualified in an already specialized field. The court also noted, whether it took it into account or not, that she always received positive performance reviews.

As referenced in my paper dealing with dependent contractors, the Ontario Court of Appeal also awarded an exceptional notice period in a dependent contractor scenario in *Keenan* v. *Canac Kitchens Ltd.*[3] The court found that a married couple, despite Canac Kitchen's position, were not independent contractors, but rather dependent contractors and therefore entitled to reasonable notice of their termination. The court took into account the husband's age of 63 and his length of employment of 32 years and the wife's age of 61 and her length of employment of 25 years, in finding that they were both entitled to 26 months of notice of their terminations.

In addition to rising notice periods, fixed term contracts gained some unfortunate attention this year as well. In *Howard* v. *Benson Group Inc.* *(The Benson Group Inc.)*[4], the Ontario Court of Appeal made a significant finding in a case where a fixed term contract had not yet expired. The employer had hired the employee on a 5 year term, but did provide for an early termination prior to the expiry of the term clause which read, "*Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario*". The employee was terminated 23 months into the employment agreement, with 37 months to go. The court found that the early termination clause was overly vague and therefore void and struck the clause from the contract. The lower court simply assessed a reasonable notice period based on the 23 months of service, subject to mitigation earnings.

On appeal, the Ontario Court of Appeal agreed that the early termination clause was unenforceable, but found that without it, the employer had no right to terminate the contract before the expiry of the 5 year fixed term contract and by doing so, was liable for the 37 months remaining, regardless of whether the Plaintiff mitigated or not. This was a $200,000 lesson for the employer.

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1 2015 ONSC 1081 (CanLII)

2 2015 ONSC 7598 (CanLII)

3 2016 ONCA 79

4 2016 ONCA 256 (CanLII)

Confusion also set in over the last year in regards to whether the economic conditions of the employer can factor into the determination of reasonable notice periods of dismissed employees. In *Gristey* v. *Emke Schaab Climatecare Inc.*[5], the Ontario Superior Court of Justice did take into account the steady decline in the company's business in determining that the employer was entitled to pay less pay in lieu of notice. In this case, the employer terminated 9 employees due to no work being available. The trial judge noted that given the Plaintiff's age (52), length of employment (12 years) and position (general labourer), he would have found a notice period of 12 months. However, in factoring in economic conditions, the trial judge opted to decrease that notice period to 8 months and explained that, "this is a recognition that…had Mr. Gristey's employment not been terminated, he would have likely worked less hours during the notice period. Thus, it would not be fair to the Defendant to apply the full twelve-month notice period."

However, the Ontario Court of Appeal rejected this argument in *Michela* v. *St. Thomas of Villanova Catholic School*[6], finding that *"an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled".*

Paquette v. *Terago Network*[7] dealt with how a reasonable notice period that has not yet expired gets dealt with by the courts. In this case, the Ontario trial judge found the appropriate notice period for the Plaintiff to be 17 months (with 14 years of employment, age of 49 and Director of IT) but only 6 months of that period had elapsed by the time of trial. The judge ordered the employer to pay the full 17 months to the employee and found that *"if he earns mitigation income, he will have to simply account for it or be liable for breach of trust".*

As the above shows, notice periods are complex and a bit of a moving target. Proper contractual drafting can avoid some of these situations altogether.

5 2014 ONSC 1798 (CanLII)

6 2015 ONCA 801 (CanLII)

7 2015 ONSC 4189 (CanLII)

CHILL OUT (THINGS GONNA CHANGE)

The Changing Workplaces Review

by Beth Traynor

CHILL OUT (THINGS GONNA CHANGE)

The Changing Workplaces Review

by Beth Traynor

In February 2015, the provincial government appointed two Special Advisors to lead and coordinate public consultations on how the *Employment Standards Act, 2000* (the "*ESA*") and the *Labour Relations Act, 1995* (the "*LRA*") could be amended to better protect workers in the changing economy. The two Special Advisors are a former labour lawyer and now arbitrator C. Michael Mitchell and the Honourable Justice John C. Murray.

Mr. Mitchell and Justice Murray are expected to release an Interim Report any day now. We understand that some of the issues being considered are:

Under the *LRA*

- the potential inclusion of agricultural, horticultural and professional employees, who are currently excluded
- expansion of the application of related/joint employer principles, which could affect franchises, temporary help agencies, etc.
- at what point a Union should have access to employee lists
- consolidation of bargaining units to make it easier to organize small employers
- broader-based bargaining
- workers' councils – employees working in a concerted way without the involvement of a union
- the imposition of penalties for contraventions

Under the *ESA*

- who is an "employee"? - redefined to include dependent contractors and other current exclusions
- who is an "employer"? – redefined to include vertical and horizontal relationships such as franchisor/franchisee, subcontractors, temporary help agencies and their clients
- equal pay for equal work between part-time and full-time employees
- should employers be permitted to require a certain amount of mandatory overtime?
- re: scheduling – is there a way to protect part-time workers?
- paid sick days
- definition of "just cause" on termination
- greater enforcement and heavier penalties – "it costs more to go through a stop sign than to contravene the *ESA*"

We understand that the Review received far more submissions from organizations representing employees/Unions than from the management side. You can review the list of participants here.

We understand that the Interim Report will be published here when it is released and we encourage you to review it and consider whether you may wish to respond.

WISH YOU WERE HERE

Considerations in Developing Attendance Management Programs

by Mary Lou Brady and Christopher Sinal

B.

WISH YOU WERE HERE

Considerations in Developing Attendance Management Programs

by Mary Lou Brady and Christopher Sinal

Managing employees' attendance at work is vital to the success of an employer's operations. For many employers, a formal or informal process for addressing attendance issues is a useful tool for accomplishing this objective. However, the execution of attendance management programs ("AMP"s) can also present risks for employers given that absences often relate to issues that fall under the protection of the Ontario *Human Rights Code* ("*Code*") (or similar legislation). As well, where an AMP results in discipline for an employee, the program may be open to challenge before a court or arbitrator.

Generally speaking, most complaints challenging the validity of AMPs revolve around the following issues:

1. whether the program inappropriately combines culpable and non-culpable absences;
2. what threshold is used by management to enter employees into such a program; and,
3. whether the employer applies the AMP mechanistically.

Culpable vs. Non-Culpable Absenteeism

AMPs often track two types of employee absences: those due to some culpability on the employee's part (i.e. sleeping in, no call/no show, etc.); and those where the absence is due to illness, injury, or other reason wholly outside the employee's control (non-culpable).

Intermittent and unpredictable non-culpable absences can have significant effects on the management of the workplace, often more so than longer absences. As one arbitrator noted:

> *[The company] has a right to expect consistent attendance on the job and it is affected far more than in a case of one very lengthy absence. For the latter, the company just replaces the employee once and for all until he returns, and by an employee who gets training and experience early in the job. If an employee is constantly missing a few days work, or, even worse, leaving during the middle of a shift, this simple solution is not possible. It is continually irritating to supervisors, and very harmful to production, always to be making adjustments and putting whatever employee is immediately available into the absentee's place. There will not be just one replacement, assigned to the job for a lengthy foreseeable period, who soon becomes an experienced and regular performer of the job.*[1]

While an employer may not discharge an employee for non-culpable (or "innocent") absenteeism, it is possible for the employment relationship to become "frustrated" due to the effect that sporadic, non-culpable absenteeism has on the employer's operations. As in all such frustration cases, the question will be whether the employee will be unable to work consistently for the reasonably foreseeable future even though the employer has tried to accommodate him or her.

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1 Massey-Ferguson Ltd. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Clement Grievance), [1969] O.L.A.A. No. 2 (Weiler) at para. 7.

However, where an AMP results in employees being disciplined and potentially terminated due to excessive absenteeism, non-culpable absences cannot be used as the basis for the decision to discipline and/or terminate the employee for cause, as this would offend human rights legislation.[2] For example, in *Coast Mountain Bus Company*[3], the British Columbia Court of Appeal considered Coast Mountain's AMP that consisted of a five-phase program:

- After employees with high absenteeism were identified, Coast Mountain had informal communications with them to allow the employees to provide the reason for the high rate of absenteeism;
- Next, a Level 1 interview occurred that was intended to make the employee aware of Coast Mountain's concerns with his or her absenteeism and to offer any assistance that would lead to more acceptable attendance;
- If attendance did not improve, a Level 2 interview was held. Here, the employer requested a medical assessment from the employee to assist in determining his or her ability to work on a regular basis and ascertain whether the employee had a medical disability;
- After the employee's medical information was assessed, a Level 3 interview occurred. In this interview, Coast Mountain communicated its attendance expectations and the possible consequences if the employee did not meet those expectations. Those attendance expectations were based on the average absenteeism rate of Coast Mountain's transit operators. In calculating the absence rate of the employee, days missed for short-term disability, long-term disability and workers' compensation claims were counted as absences.
- If the employee failed to meet the attendance expectations, an employment status review occurred. At that stage, the company made a decision on whether or not to terminate the employee.

The Court held that the employer's practice of including absences due to short-term disability, long-term disability and workers' compensation claims in calculating absenteeism, both for placing employees at the level 3 interviews and monitoring them after the level 3 interview, was discriminatory. This was due to the fact that some employees were being disadvantaged as compared to other employees due in whole or in part to their disabilities. The Court noted that the employer applied the same attendance expectations to disabled and non-disabled employees alike, despite being aware that an employee's disability could lead to elevated absence levels. The Court concluded that this was discriminatory because disabled employees ended up progressing through the levels of the AMP process more quickly, wholly as a result of their disability.

It is therefore important to clearly and explicitly note in any AMP that, where absences are due to non-culpable reasons, the underlying issues will be addressed through the employer's normal human rights accommodation procedure and such absences will not be included in any attendance calculations that could lead to discipline/termination.

Determining a Threshold

2 There can be significant differences in an employee's entitlements upon the end of employment depending on whether the exit is due to frustration (i.e. non-culpable) or termination for cause (i.e. culpable).

3 *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447

Many AMP's require that employees reach a triggering threshold before commencing attendance management meetings (for example, X number of absences over a given time period, or X% absence rate above the workplace average).

Particularly in unionized environments, employers are generally required to ensure that such thresholds are reasonable. To that end, arbitrators have established a number of criteria that are legitimate considerations for setting an attendance management threshold, including: average absence rates in the enterprise, the industry and comparable industries, and the percentage by which the figures chosen as thresholds under a particular program exceed those averages; and, the number of employees who are likely to be caught based on the thresholds established.

In *London (City) 2012*,[4] the arbitrator considered, among other things, whether the employer's triggering threshold in its attendance policy was unreasonable. The arbitrator stated that while there must be a rational basis for an attendance management threshold, "it is well established that there is nothing *prima facie* unreasonable about an [attendance program] which establishes a triggering threshold that applies across all of an employer's occupational groups, or which is not tailored or tied to an average or other rate of absenteeism within any of the employer's occupational groups"[5].

Avoiding Mechanistic Application

Whether an AMP is being used to manage culpable or non-culpable absences, it is important that the program consider all of the surrounding circumstances before any decisions are made concerning an individual's employment status. It should come as no surprise that where an employee's non-culpable absences warrant attendance management discussions to review (among other things) what accommodation options are available for the employee, the employer must ensure that it consider the specific needs of the employee.

However, an employer must also take care to ensure that it has undertaken an individualized approach to managing employees, even where the employees are being counselled due to an excessive rate of *culpable* absences. For example, in *London (City) 2009*,[6] the arbitrator found it unreasonable that the employer reviewed employees' situations before any meeting between the employee and a manager had occurred. The arbitrator found this aspect of the AMP unreasonable as it suggested that a decision on how to address the employee's attendance issues had been made *before* meeting with the employee.

Conclusion

Fundamentally, the most successful AMPs are those that take into account the individual circumstances of employees and work with them to improve attendance issues rather than simply punishing absences. This type of individualized approach, with meetings and open communication, will help identify potential accommodation issues (for non-culpable absences) and also lend support to any disciplinary decision that may arise (for culpable absences).

4 London (City) v London Professional Firefighters' Association, 2012 CanLII 18862 (Surdykowski)

5 Ibid., at para. 26.

6 London (City) v. CUPE, Local 101 (Policy Grievance), [2009] O.L.A.A. No. 425 (Rayner)

BIOGRAPHICAL INFORMATION

C.

Mary Lou H. Brady

Partner—London

Mary Lou practices exclusively in the area of management-side employment law.

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PROFILE

As a partner at Siskinds in its London, Ontario office, Mary Lou practices exclusively in the area of management -side labour and employment law.

Mary Lou recognizes that people are the most valuable resource in any organization. She works co-operatively with employers and human resource professionals to manage this critical resource through practical advice and real-world solutions.

As such, Mary Lou represents employers in the full spectrum of the employment relationship, with particular emphasis on hiring and retention of employees, employment agreements, employee discipline, employee terminations and wrongful dismissal actions, human rights, employment standards, policy development and day-to-day legal compliance.

Mary Lou has also developed two unique subsets to her practice. The first focuses on employment-related issues arising in downsizings, closures and sales or purchases of businesses. The second focuses on the Accessibility for Ontarians with Disabilities Act (the "AODA") and assisting organizations with AODA compliance.

As a trusted advisor, Mary Lou prides herself on developing strong, long-lasting client relationships while delivering excellent results that are born of talent, training and true commitment to her clients.

Mary Lou joined Siskinds in January 2005 as part of the firm's initiative to expand its Labour & Employment Group. Before doing so, she spent six years practicing management-side labour and employment law for a large national law firm in both its Toronto and London offices.

EDUCATION

Western University

PUBLICATIONS & SPEAKING

- New ESA Poster Requirements for Ontario Employers
- Litigation Perils: Winning the battle, but losing the war!
- New Human Rights Commission Policy on Mental Health and Addiction
- $2.5 Million Canadian Payroll Triggers ESA Severance Obligation
- Proposed Ontario Bill will Impact Unpaid Wages and Temporary Hiring Agencies
- Terminating Employees on Job-Protected Leaves: Can I do it?
- The Expanding World of Job-Protected Leaves: What's Next?
- Employees With Scent Sensitivities: A Case Study
- Gender Expression and Gender Identity: New Protected Grounds of Discrimination
- Sobering Thoughts: Hosting Social Functions with Alcohol and How to Reduce Your Liability

Mary Lou is frequently speaks to groups on employment topics. Most notably, she has now organized more than a dozen annual conferences for employers, speaking on topics such as employee alcohol consumption, employment law pitfalls, employment contracts 101, employee social networking, and accommodating disabilities.

COMMUNITY INVOLVEMENT

Mary Lou is a proud community supporter. She believes in the importance of giving back, both with her time and resources, to individuals and organizations in London and its surrounding communities.

- Thames Valley Children's Centre (Human Resource Committee Member)
- Hope's Garden, Eating Disorder Support & Resource Centre (Past Chair and Board Member)
- 100 Women Who Care London (Member)

MEMBERSHIPS & ASSOCIATIONS

- Member, Law Society of Upper Canada
- Member, Middlesex Law Association

Elizabeth M. Traynor

Partner—London

Beth has practiced management-side labour and employment law for her entire legal career.

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PROFILE

Beth Traynor is a partner in Siskinds' Labour and Employment Group and has practiced exclusively management-side labour and employment law for her entire career.

The L&E Group has an excellent record of achieving its clients' goals, which include successful litigation outcomes, favourable settlements, practical resolutions to workplace issues, optimal negotiated provisions in purchase/sale transactions, etc..

Beth has a particular focus on labour law, ie. representing employers in unionized environments, but also represents many clients who are, and wish to remain, non-unionized. She enjoys travelling to represent clients across Southern Ontario, the Greater Toronto Area and the near North.

EDUCATION

University of Windsor

PUBLICATIONS & SPEAKING

- Unions utilizing creative organizing strategies in the service sector
- Proposed Ontario Bill regarding unpaid wages and temporary hiring agencies
- New Health & Safety Training Obligations
- Why Do You Call a Lawyer?
- “Hot” Issues In Labour & Employment
- Tattoos and Trustworthiness – Discrimination for Decoration?

- Looking Forward: What's on the horizon?
- The Wit (not just wisdom) of the Bench
- Court Of Appeal Finds That Disrespectful, Insubordinate Communication Is Irreconcilable With Continuing Employment
- Does your home renovation make you a "constructor"? Believe me, you need to know!

Beth is frequently asked to speak on labour and employment topics and has presented continuing education programs for the Law Society of Upper Canada, community colleges, and numerous client events. She is also an active contributor to the L&E Group's blog.

COMMUNITY INVOLVEMENT

Beth is sincerely committed to giving back to the community which has provided her family with tremendous support for many decades. She is always actively involved in charitable endeavours, generously contributing both time and resources for the betterment of the community.

- Secretary, Board of Directors, GoodLife Kids Foundation (2006-2014)
- Member, United Way Major Gifts Committee (2012-2014)

NOTABLE WORK & DECISIONS

- Counsel, Paterno v. Governing Council of the Salvation Army in Canada, 2011 HRTO 2298, in which the Human Rights Tribunal found in favour of the employer by narrowing its jurisdiction to review a labour arbitrator's decision.
- Counsel, I.P.U.C., Local 1 v. Norampac Inc., 2008 CarswellOnt 9065, in which the arbitrator found that the employer's scheduling of shifts did not contravene the Employment Standards Act.
- Counsel, Vandervelde v. GoodLife Fitness Centres Inc., 2012 HRTO 1042, in which the Human Rights Tribunal found in favour of the employer, indicating that a failure to provide childminding services in every location does not constitute discrimination.
- Counsel, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 v. Matrix Service Inc., 2004 CanLII 22333, in which the Ontario Labour Relations Board clarified the distinction between construction and maintenance work.
- Counsel, Hassan v. London Police, 2010 ONSC 1818, in which the Court found in favour of the employer, finding that the Plaintiff's claims were not within the jurisdiction of the Court.

MEMBERSHIPS & ASSOCIATIONS

- Member, Law Society of Upper Canada
- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Middlesex Law Association

Jennifer L. Costin

Partner—London

Jennifer advises clients on labour and employment law matters.

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PROFILE

Jennifer is a partner in our London office and practices exclusively in the area of management-side labour and employment law. In this role, Jennifer advises organizations on matters related to hiring, discipline, human rights issues and particularly accommodation, policies, procedures, terminations, wrongful dismissal lawsuits, grievance and arbitration matters and administrative complaints.

Jennifer is attuned to clients' needs and goals and works with employers to craft the best approach to workplace issues

EDUCATION

University of Ottawa

PUBLICATIONS & SPEAKING

- How well do you understand the recent changes to the Employment Standards Act, 2000?
- Non-competition clauses can be more damaging than just being unreliable
- Be careful how you treat employees after advising that a fixed term contract will not be renewed

Jennifer speaks regularly to various groups on employment and labour topics and is always happy to do so. She speaks annually to various districts of the Excellence in Manufacturing Consortium and at Siskinds' annual client conference.

Jennifer was also an instructor at Fanshawe College for the Labour and Employment Course.

COMMUNITY INVOLVEMENT

Jennifer is actively involved with her community in the following ways:

- Co-Chair, Golf Committee, Big Brothers Big Sisters of London & Area
- Past Member, Cooking for Kids Program
- Past Member, Fundraising Committee, Childreach
- Past Volunteer, Southwest Optimist Soccer
- Past Member, Board of Directors, Alzheimer Society of London and Middlesex
- Past Member, Human Resources Committee of the Board of Directors of St. Joseph's Health Care
- Past Member, Board of Directors, Association for the Elimination of Hate

MEMBERSHIPS & ASSOCIATIONS

- Member, Law Society of Upper Canada
- Member, Middlesex Law Association
- Member, Canadian Bar Association

AWARDS & RECOGNITION

Jennifer was selected by her peers to receive the 2011 Middlesex Law Association Rising Star award.

Christopher A. Sinal

Associate—London

Chris practices management-side labour and employment law.

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PROFILE

Christopher A. Sinal is an associate with Siskinds' Labour and Employment Group, with a practice focused exclusively on representing employers. Chris and the L&E Group favour a collaborative and team-oriented approach, working with clients to develop pragmatic and cost-effective solutions to workplace issues.

Chris' practice primarily focuses on assisting unionized clients in a variety of labour relations matters, such as grievance arbitration, collective bargaining, and managing day-to-day workplace issues. Chris works with clients throughout the broader public sector, particularly rural hospitals and children's aid societies. He also has experience in construction labour relations, assisting clients in responding to certification applications and grievances before the Ontario Labour Relations Board.

Chris also works with both unionized and non-unionized clients to address Occupational Health and Safety and WSIB matters, human rights concerns, and employee discipline and termination issues.

EDUCATION

The University of Western Ontario
University of Alberta

PUBLICATIONS & SPEAKING

- Alberta Court of Appeal Upholds Termination of Employee for Cocaine Use That Resulted in Workplace Accident

- Supervisors Increasingly Face Jail Time in Health and Safety Prosecutions
- Workplace Safety and Insurance Board Consulting Regarding New System for Calculating Employer Premiums
- Unionized Employee Dismissed from Hydro One for Off-Duty Conduct Reinstated to His Former Position
- Ontario Labour Relations Board Finds that Employee Fired for Sleeping on the Job is Still Entitled to Termination Pay
- Court Awards Former Employee 27 Months' Pay in Lieu of Notice of Termination
- Ontario Human Rights Tribunal Awards over $150,000 to Former Employees That Suffered Sexual Discrimination
- Terminating an Employee without Checking Their HR File First Can Have Serious Consequences for Employers
- New Amendments to the Employment Standards Act, 2000 May Require Employers to Find Themselves Guilty of Violating the Act

COMMUNITY INVOLVEMENT

Chris is actively involved in the London community. He currently sits as a member of the Children's Aid Society of London & Middlesex Board of Directors and is a member of the Huron University College Corporation. He a past Vice-Chair of the Board of Directors of Addiction Services of Thames Valley, and is a past member of the Board of Governors of Western University.

MEMBERSHIPS & ASSOCIATIONS

- Member, Law Society of Upper Canada
- Member, Middlesex Law Association
- Member, Canadian Bar Association
- Member, Ontario Bar Association