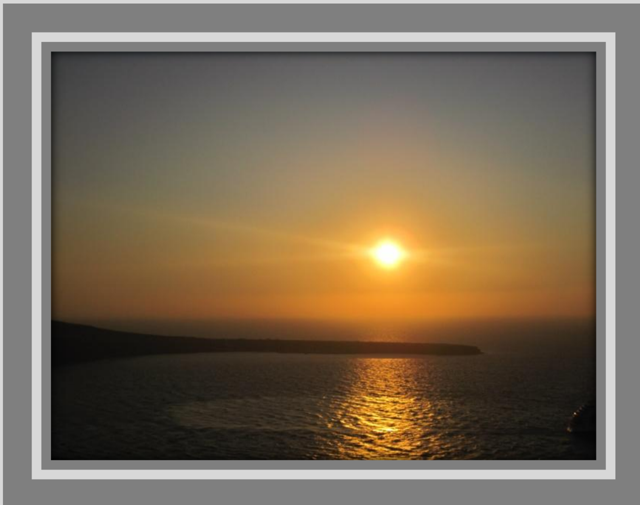
SUMMER 2011 VOLUME #2 – ISSUE # 3

LABOUR & EMPLOYMENT LAW NEWSLETTER



IN THIS ISSUE

Test your knowledge:……………………….. Page 1

What Rights Do Your Employees Have to Unpaid Leave ………………………………….. Page 2

What Every Smart Employer Should Know About Monitoring Employee E-mail………… Page 3-4

Workplace Relationships: Keeping Workplace Romances in the Lunch Room (not the Court Room)………………………………………… Page 5

Legislative Update…………………………... Page 5-6

ABOUT US

Soloway Wright LLP's Employment Law Group provides legal advice on all issues of employment law, labour law and human rights

TEST YOUR KNOWLEDGE:

Would you be surprised to know that…?

Directors' Liability – As a Director of a company you are personally liable for any unpaid wages of your employees up to his/her final day on the job (but not for unpaid termination or severance pay).

Overtime Pay – You must compensate employees for all overtime hours worked regardless of whether or not you ever actually approved those hours.

Hiring Employees – Watch what you ask prospective employees during job interviews because certain questions are illegal and asking them could result in a Human Rights Complaint being filed against your company.

Firing Probationary Employees – If you fire a probationary employee within the first 3 months of his/her start date, you must provide him/her with notice or pay in lieu of notice unless his/her employment contract explicitly states otherwise.

Firing Part-Time Employees – Part-time employees are entitled to the same notice or pay in lieu of notice when they are dismissed as full-time employees.

Criminal Record Checks – You can't legally require employees to undergo periodic criminal record checks unless they are working in jobs which are sensitive to safety or security.

Employees Required to Give Notice – There are situations where you may sue your employees for resigning without providing you with reasonable notice.

Ontario Limitation Periods – Your provincially-regulated employees cannot claim unpaid wages, termination pay and/or severance pay from you unless they do so within 6 months of the refusal to make payment.

Soloway Wright LLP
427 Laurier Avenue West, Suite 900
Ottawa, ON K1R 7Y2
613-236-0111 office ● 613-238-8507 fax
www.solowaywright.com

WHAT RIGHTS DO YOUR EMPLOYEES HAVE TO UNPAID LEAVE?

In Ontario, all employees have a legal right to take unpaid, job-protected leave for a variety of reasons. Here is an overview of some of the various types of leave which you must give to your employees:

Pregnancy Leave

TIME-OFF: Pregnant employees are entitled to up to 17 weeks of unpaid time off work.

ELIGIBILITY: This leave is available to all full-time, part-time, permanent or contract employees. To qualify, however, the employees must have been hired at least 13 weeks before the baby's expected birth date.

NOTICE: Employees must give at least 2-weeks' notice in writing before going on leave. Employers have the right to request a medical certificate indicating the baby's due date.

OTHER FACTS: Pregnancy leave ends when the employee returns to work, even on a part-time basis. Additionally, employees who experience pregnancy complications may also be entitled to additional unpaid leave beyond the original due date.

Parental Leave

TIME-OFF: New parents are entitled to 37 weeks of unpaid time off work when a child is born or first comes into their care.

ELIGIBILITY: A parent can include a birth parent, adoptive parent, and persons in a relationship who treat the child as their own (including same-sex couples). Employees must have been hired for at least 13 weeks before the start of the leave.

NOTICE: Employees must give at least 2-weeks' notice in writing before taking this leave.

OTHER FACTS: Employees who have also taken pregnancy leave are only entitled to take up to 35 weeks of parental leave and this leave must begin within the first year of the employee becoming a parent.

Family Medical Leave

TIME-OFF: Employees are entitled to up to 8 weeks of unpaid time off work in a 26-week period to provide care or support to certain family members.

ELIGIBILITY: The family member being cared for must have a serious medical condition that could result in death within 26 weeks. This information must be confirmed by a medical practitioner.

NOTICE: The employee must give notice in writing before starting such leave.

OTHER FACTS: If two or more employees qualify to take this leave in order to care for the same ailing family member, they may be required to share the 8 weeks of leave.

Personal Emergency Leave

TIME-OFF: Employees can take up to 10 days of unpaid time off work per year due to personal illness, injury or personal medical emergency, or that of a relative. Entitlement to this leave is separate from family medical leave. Many employers provide paid time off for this type of leave but they are not legally required to do so.

ELIGIBILITY: This leave is available only to employees who work for companies that have at least 50 employees.

NOTICE: Where applicable, employees should provide notice before taking the leave, or as soon as possible thereafter. This notice does not have to be in writing.

OTHER FACTS: Employers can count any part of a day which the employee takes off as a full day of personal emergency leave. The Ministry of Labour also recognizes the following examples as legitimate reasons for this leave:

a) the employee's babysitter calls in sick;
b) the house of the employee's elderly parent is broken into and the parent needs emotional support; and
c) the employee has an appointment to meet his child's counsellor to discuss behavioural problems at school.

While on Leave

An employee is not legally entitled to be paid during any of the leaves of absence described above but he/she does continue to earn credits towards seniority, length of service and also length of employment. This means that the time taken for leave must be included when calculating future notice of termination or severance pay.

While the employee is on leave, however, the employer must also continue to pay its share of the premiums for benefit plans such as pension plans, life and extended health insurance plans, accidental death plans and dental plans. Any denial of credit for accrued seniority or reduction in an employee's benefits is illegal.

Coming Back to Work

Once the employee's leave is complete, the employer must reinstate him/her to the same or similar position as before he/she went on leave, without penalty or reprimand. It is illegal for an employer to demote or reduce the pay or working hours of an employee who takes a legitimate leave of absence. The Courts will reinstate workers to their former positions if improperly fired or demoted for taking or returning from leave.

WHAT EVERY SMART EMPLOYER SHOULD KNOW ABOUT MONITORING EMPLOYEE E-MAIL

Employers have a right to know if their employees are abusing company computers and e-mail, but the law imposes some restrictions on how far they can go to spy on their employees' e-mail and internet use. Employees have certain privacy rights and there are limits on how far you can go to monitor your workers without violating those rights.

The conflicting rights of employers and employees over computer use is another Internet age showdown which is already beginning to have a profound impact on companies and the workplace. How do you know whether your employees are working as opposed to web surfing, social networking, shopping, downloading, viewing or sending pornography or racist material, sending degrading messages about colleagues or customers, running an illegal business or stealing confidential company information? The consequences of leaving your employees totally unmonitored can be expensive and sometimes even catastrophic. Take Chevron, which paid $2.2 million in damages for sexual harassment stemming from jokes sent through an employee's e-mail. In a similar case in 1997, a racist joke sent via an employee's e-mail gave rise to a $60-million lawsuit.

In this kind of environment, smart employers have clear policies that recognize their workers' privacy but also set restrictions on computer use which they carefully monitor to ensure compliance by their employees.

Privacy Protection in the Law

The *Personal Information Protection and Electronic Documents Act* ("PIPEDA") is federal legislation that outlines what is *reasonable* in workplace surveillance. Employers must demonstrate that any intrusion of privacy is limited to what is "*absolutely necessary*". Other than PIPEDA, there is no specific legislation in Ontario governing the privacy rights of persons employed by provincially-regulated businesses.

Privacy rights are recognized in the *Charter of Rights and Freedoms* (Section 8), the *Criminal Code*, and also at Common Law. For example, section 184 of the Criminal Code makes it a criminal offence to "*wilfully intercept a private communication*" using a device, such as a computer. Although this seems very broad, the Criminal Code defines "*private communication*" as "*communication made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any other person*".

Finding the "Reasonable" Balance

Privacy rights are not absolute and must be balanced against employers' legitimate business interests. Employers can monitor e-mail and internet use (including access to e-mails and computer files) so long as such monitoring is done reasonably. The Courts have interpreted this to mean that employers may monitor computers provided that the employees do not have a "*reasonable expectation of privacy*" in the communication or file. So what does this mean?

A Reasonable Expectation of Privacy?

A reasonable expectation of privacy means that an employee must be able to expect – within reason – that the information they produce or communicate is private or confidential. The Courts have decided that this "*reasonable expectation*" will depend on the circumstances of each situation, including:

- Whether the employee owned the property or had possession or control of the property/place searched;
- What the property or item was used for;
- The ability to regulate and exclude access (such as using a password);
- The employee's subjective expectation of privacy; and
- The objective reasonableness of that expectation.

The Court shed some light on the issue in a recent decision involving a high school computer teacher who had child pornography on the laptop given to him by the school to use for both work-related and personal use purposes. The school's IT technician found the pornography in a hidden folder on the laptop's hard drive during a routine check-up of the system.

The key issue facing the Court was whether the teacher had a '*reasonable expectation'* that the contents of his laptop were private. The Court looked at a number of factors and decided that the teacher did have a reasonable expectation of privacy in his personal use of the laptop for the following reasons:

- The school board gave teachers exclusive possession of the laptops and permission for their use at home, on weekends and during summer vacations;
- The school board gave teachers explicit permission to use the laptops for personal use;
- The teachers used passwords to exclude others from their laptops;
- Nearly all teachers stored personal information on their hard drives; and
- There was no clear and unambiguous policy in place which allowed the employer to monitor, search or police use of the laptops.

But the Court also found the teacher's right to privacy was subject to the "*limited right of access by his employer's technicians performing work-related functions*" to maintain the system. This means the teacher's privacy rights didn't protect him from the technician finding the pornographic file during routine maintenance. According to the Court, the teacher should have been '*reasonably*' aware of the functions the technician had to perform and should have '*expected*' this type of access to his computer.

The Bottom Line

This case drives home that employers should have a monitoring policy and should ideally try to obtain consent from employees to monitor their email and computer use. This consent can be a signed agreement or an electronic form that describes the policy and requires employees to click a box indicating their knowledge and consent of the policy.

In summary, the best way for employees to guard against computer and e-mail abuse is through clear policies that spell out the restrictions on personal use of company computers and make clear the data they house is not private and could be subject to monitoring. This makes it difficult for employees to argue they had an expectation of privacy in their computer files.

WORKPLACE RELATIONSHIPS:

KEEP OFFICE ROMANCES IN THE LUNCH ROOM (NOT THE COURT ROOM)

Office romances: They can be harmless but they can also disrupt the workplace with innuendo, gossip and resentment. They're messy when they go wrong and can kill morale, damage reputations, ruin careers, affect business and even carry potential legal consequences.

You can't reasonably ban or prohibit workplace romances. They are not grounds for disciplinary action. But employers can protect themselves from damaging consequences by setting and enforcing clear policies on how workplace relationships will be handled, what will be tolerated and when they should be reported to the employer. Having good policies in place may prevent inappropriate liaisons from happening in the first place or give employers some legal protection when they do surface.

The most problematic relationships for employers and employees alike are romances that develop between supervisors and subordinates. An affair between a manager and a subordinate is built on a power imbalance and a conflict of interest that is fraught with problems. For instance, any special assignments, promotions, or raises the subordinate receives may lead to allegations of favouritism. This conflict of interest can be resolved by a change in the reporting relationship or by relocating one of the partners so they are no longer working together. A manager should never supervise a romantic partner!

Far more worrisome, however, are cases where a subordinate feels pressured or forced into a sexual relationship with a direct supervisor for fear that rejecting unwanted advances could have adverse on-the-job consequences. Whether the pressure is real or perceived, this is called sexual harassment and no workplace should be without clear policies that explain what behaviour is expected of managers and employees and how to report violations.

Recent Court decisions drive home the importance of having clear and consistently enforced policies. Take the example of a manager at an automotive manufacturing company who sued for wrongful dismissal after he was fired for having extra-marital affairs with two of his subordinates - both married to men working at the same company. He was demoted and transferred when the first affair was discovered and then, despite warnings that such relationships could be grounds for dismissal, he took up with another worker who reported to him. The manager argued that both relationships were consensual and private but the Court ruled that consent did not offset the power imbalance between supervisors and their subordinates. More importantly, the Court found the company had cause to fire him because it had consistently enforced its policy and warned him that such indiscretions were inappropriate and grounds for firing.

In another case, a female employee sued for damages for the psychological harassment and unwanted sexual banter she endured from her boss. The employer argued that if she felt harassed, she should have reported it and her failure to do so was a breach of contract. The Court disagreed. The company's policy manual encouraged workers to report harassment but didn't make it obligatory for them to do so. The company lost, and was ordered to pay her damages.

Romantic relationships are bound to develop when people spend most of their waking hours at work. When such a relationship arises, employers may have to choose between losing a valued employee and turning a blind eye to the relationship. That may not be a viable option because courts have repeatedly ruled that the failure to enforce a workplace policy, by turning a blind eye to it, ultimately makes that policy unenforceable. By ignoring the relationship, you may therefore be setting a precedent for future relationships between other employees.

When a new relationship comes to light, an employer could meet with the employees to discuss potential impacts on colleagues and ensure that they understand that their relationship must not affect the workplace or their performance on the job. This is also an opportunity for the employer to determine the nature of the relationship and to ensure that both employees are comfortable.

Depending on the circumstances, employers may want to consult with a lawyer before meeting with the employees to ensure these tricky situations are handled in the most appropriate manner.

LEGISLATIVE UPDATE

Bill 160 - Occupational Health and Safety Statute Law Amendment Act, 2011

This law signals an overhaul of health and safety regulations in Ontario by implementing the recommendations of the Dean Report. The report was commissioned by the province after four construction workers died when the scaffolding they were working on collapsed.

The most significant changes for employers include:

- A new Chief Prevention Officer (CPO) to oversee occupational health and safety in Ontario;
- The CPO will set standards for mandatory health and safety training for all employees. Employers will be obligated to follow

these standards and implement appropriate employee-training regimes;

- The co-chairs of Joint Health Safety Committees (JHSC) will have expanded powers to make health and safety recommendations directly to employers without consensus from the committees. Employers will then have to respond to these recommendations within 21 days; and
-
- The Ministry of Labour's health and safety inspectors can now refer complaints of employer reprisal against an employee to the Ontario Labour Relations Board.

Bill 160 does not set any new monetary penalties for "*wilful or repeat offences that immediately place workers at serious risk*", as recommended by the Dean Report.

Accessibility for Ontarians with Disabilities Act, 2005

This law has been on the books since 2005 but new regulations will require all private sector organizations in Ontario employing at least one employee, and providing "goods and services" to the public, to comply with Accessibility Standards for Customer Service.

Employers who fail to comply may be fined $100,000 a day. This will take effect January 1, 2012.

Also at the same time, private sector employers will have to:

- Develop customer service policies and procedures for serving people with disabilities;
- Make sure these policies and procedures are consistent with the principles of independence, dignity, integration and equality of opportunity;
- Have policies allowing people to use their own assistive devices (e.g., cane, wheelchair, oxygen tank, etc.) to access goods and services;
- Be able to communicate with a person with a disability in a manner that takes into account his or her disability;
- Allow people with disabilities to be accompanied by their guide dog or service animal in areas of your business that are open to the public;
- Permit people with disabilities who rely on a support person to bring that person with them while accessing your goods or services;
- If facilities or services for people with disabilities (such as an elevator or accessible washroom) are available, let people know when they are out of order;
- Train staff, volunteers and contractors to serve customers with disabilities;
- Let customers with disabilities provide feedback on how you met their needs and establish a process to respond and take action on any complaints; and
- If admission fees are charged, post whether or not you charge fees for a support person of a person with a disability.

The obligations imposed by the new regulations will be phased in over time. Large organizations with 50 or more employees must comply with all regulatory changes by Jan. 1, 2016 and organizations with fewer than 50 employees will have until Jan. 1, 2017.

Future editions of this newsletter will keep you posted on legislative and regulatory updates.

SOLOWAY WRIGHT LLP EMPLOYMENT LAW GROUP

Alan Riddell	**613-782-3243**	riddella@solowaywright.com
Stephen Shaddock	**613-782-3211**	shaddock@solowaywright.com
Darrell Mast	**613-236-0111**	mastd@solowaywright.com
Krystal Moore (Employment Law Clerk & Newsletter Co-editor)	**613-782-3248**	kmoore@solowaywright.com
Catherine Davis (Law Clerk & Legal Assistant)	**613-782-3235**	davisc@solowaywright.com
Gillian Bilton, Law Student	**613-236-0111**	gbilton@solowaywright.com

SolowayWright LLP
Barristers & Solicitors / Avocats

DISCLAIMER

This newsletter is provided for general information only and is not intended as professional legal advice. Its contents are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. It is not intended that a solicitor-client relationship arise from the sending or reading of this newsletter. Questions and comments concerning materials in this newsletter are welcomed and encouraged.