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Soloway Wright lawyers

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LABOUR & EMPLOYMENT LAW NEWSLETTER

An Update for CEOs, HR Managers, Corporate Executives and In-House Counsel on the Latest Developments in HR and Employment Law

IN THIS ISSUE

ABOUT US

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

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DID YOU KNOW THAT…?

- In law, an employer may unilaterally and arbitrarily dictate the dates that employees must take their annual vacations (unless the employment agreement explicitly stipulates otherwise);
- Conversely, an employer has no legal power whatsoever to dictate the dates that employees take their parental leave, or their pregnancy leave, from work;
- Poor work performance rarely amounts to just cause for termination unless the employer can prove that it was mostly due to factors within the employee's personal control – such as his lack of effort or skill – *and* that he was given multiple prior warnings and opportunities to improve;
- Sick or disabled employees may be terminated if, despite reasonable steps to accommodate them, there is no reasonable likelihood of their being able to return to work in the foreseeable future. In terminating them, you are not required to pay them Common Law pay-in-lieu of notice, but must pay them the statutory termination pay, and severance pay if applicable, owing under the *Employment Standards Act*;
- As an employer, you are potentially liable to third parties for your staff's purchase of goods or their representations, on behalf of your organization, via telephone, email or the internet (*even if this is done without your authorization or knowledge*);
- No employee can be required to work more than 8 hours per day unless he/she has agreed to do so;
- No employee can be required to work more than 48 hours per week unless he/she has agreed to do so and the employer has received approval from the Director of Employment Standards; and
- As an employer, you can be held liable for failure to correctly notify a dismissed employee of her benefits conversion options and for any inadvertent misrepresentations regarding the termination of her disability coverage or the extent of that coverage.

JUDICIAL UPDATE ON EMPLOYMENT LAW:
The Most Important Court Decisions in the First Half of 2015

Potter v. New Brunswick Legal Aid Services Commission

In March, the Supreme Court of Canada released a highly significant employment law decision which clarifies for HR managers and lawyers when unilateral changes to the terms and conditions of someone's employment may amount to their constructive dismissal.

In this particular case, the Court ruled that an employer constructively dismisses an employee when it unilaterally places him on a paid leave of absence, of indefinite duration, without providing him with any sound business reasons for doing so. In its defence, the employer had unsuccessfully argued that it had the authority to place the employee on a paid leave of absence and that its actions did not constitute constructive dismissal because they had caused him absolutely no monetary loss and had no legal duty to provide him with work. The Court rejected this argument on the grounds that this employment agreement gave the employer no legal right, express or implied, to forcibly place the employee on a temporary leave of absence, or otherwise suspend him.

In concluding that the employer enjoyed no implied right to place the employee on a paid leave of absence, the Court indicated that for certain employees, the very fact of working enhances their reputation. By placing such employees on a paid leave of absence, the defendant employer denies the plaintiff employee what the Court terms a "*reputational benefit*", which is separate from the monetary benefit of his salary. According to the Court, employers cannot lawfully deny such employees the reputational benefit of working by placing them on a paid leave of absence, except where there are legitimate business reasons which necessitate forcing the employee to be temporarily absent from the workplace, and where those reasons are truthfully disclosed to the employee when he is ordered to take the temporary leave.

This case is important because it acknowledges that employees have an implied right not only to be remunerated for, but to actually perform, their jobs, and that in many cases, this legal right to work cannot be suspended, even temporarily, save in exceptional circumstances. The Court's decision sends a message to all employers that their inherent right to direct employees to take a temporary paid leave of absence is not unfettered and must be objectively justifiable, according to sound business reasons which are candidly and adequately communicated to the employee in a timely fashion.

Arnone v. Best Theratronics Ltd. 2015 ONCA 63

This past February, the Ontario Court of Appeal released an important decision which provides guidance to employers, and lower courts, on how to calculate the pay-in-lieu of notice which must be provided to elderly employees who are being terminated close to the age of retirement.

In this particular case, a lower court judge had assessed the pay-in-lieu of notice owed to the employee at 16.8 months, using a "*bridging approach*", that is to say by counting the months between the date of termination and the date that the employee would have qualified for early retirement and an unreduced pension. The Court of Appeal ruled that this "*bridging approach*" to calculating pay-in-lieu of notice was wrong and that the court should continue to use the traditional *Bardal* factors in determining the appropriate notice period. On the basis of those factors, the Court of Appeal significantly increased the notice period to 22 months.

Howard v. Benson Group, 2015 ONSC 2638 (CanLII)

This past March, the Ontario Superior Court issued yet another significant decision on the thorny issue (discussed in our last newsletter) of when a contractual termination clause, in a company's employment agreement is and is not legally enforceable.

In this particular case, the employer had terminated a managerial employee after nearly two years of service and had sought to pay him no more than his minimum statutory entitlement of two weeks' salary in-lieu of notice, in accordance with both the *ESA* and the termination clause. The termination clause explicitly provided that *"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 Act explicitly provided that any employee of 2 years' service or less need only be paid 2 weeks of notice. The employee contended that he was entitled to full Common Law notice because the termination clause was unenforceable, in that the terms "*amounts paid*" and "*any*" in that clause were hopelessly ambiguous. He argued that it was unclear whether the expression "*amounts paid*", in the clause, referred solely to his base salary or whether it also provided for payment of benefits and bonuses as required by the *ESA*. He further argued that the expression "*any*", within the clause, left the employer with discretion as to whether or not to pay the employee any money at all upon termination, and thus to evade its statutory obligation to pay. The Court accepted the argument that the expressions in the clause were ambiguous and therefore struck down the termination clause as null and void. In doing so, the Court emphasized that any ambiguities in a termination clause must be construed against the employer, due to the power imbalance between employers and employees.

This decision sends an important message to all employers, HR managers and corporate lawyers, that they must take extreme care in the drafting of the termination clause to ensure that it contains absolutely no potential ambiguities as to the employee's entitlements upon termination. Failure to do so will render the entire clause legally unenforceable, and thus useless in achieving its objective of reducing the pay-in-lieu of notice owed to the dismissed employee.

(Cont'd. on Page 4)

When Can You Safely Reduce Your Payroll By Placing Redundant Or Unwanted Employees On Unpaid 'Temporary' Layoff?

In the tough economic climate which has subsisted for the past few years, many Ontario employers have been tempted to resort to the stratagem of unpaid temporary layoffs, in the hope of temporarily reducing their annual payroll and permanently ridding themselves of certain unwanted employees, without the need to pay them statutory termination pay or Common Law pay-in-lieu of notice.

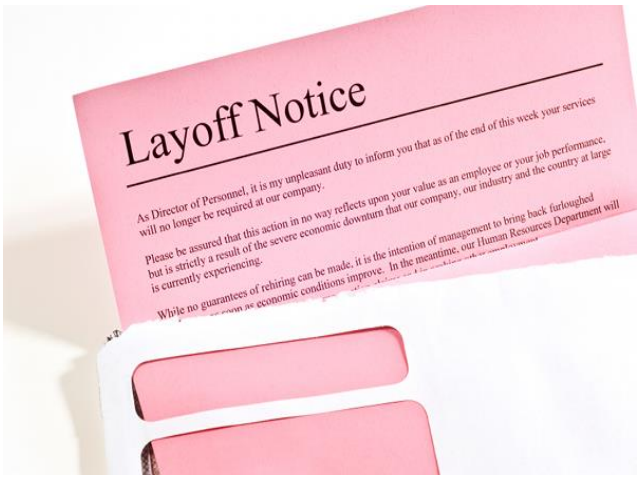
This is a highly risky strategy which employers should generally avoid, except in limited circumstances, and which even then should only be implemented with extreme caution. More often than not, the stratagem of placing unwanted employees on unpaid temporary layoff backfires by ultimately *increasing* the very payroll costs which the employer sought to *reduce*. This is so particularly where the unpaid layoff inadvertently contravenes either the Common Law or the specific temporary layoff provisions of the *Employment Standards Act*. Unfortunately, those latter statutory provisions have proven to be easily misinterpreted and misapplied, even in the hands of experienced HR managers and lawyers.

A plain but careful reading of subsection 56(2) of the *Ontario Employment Standards Act* deceptively suggests that *all* Ontario employers can unilaterally place their employees on *unpaid* temporary layoff for as long as 35 weeks in any given year, on condition that they maintain benefits coverage for those employees throughout that 35-week (8-month) layoff period. Based on the wording of this subsection of the *Act,* many employers naively assume that by issuing notices of unpaid temporary layoff to idle or unwanted employees, they can eliminate the cost of paying their salaries for as much as 8 months a year, simply by maintaining benefits coverage and abiding by the other, relatively innocuous, statutory parameters prescribed in that subsection. In many cases, employers also assume that many of the unpaid, laid-off employees will be *"starved"* into finding other jobs during the 8-month unpaid layoff period, and will never return when eventually recalled to work, thereby conveniently eliminating the need to ever formally terminate them, and to pay them any resulting statutory termination pay, severance pay or pay-in-lieu of notice.

Such assumptions are dangerously wrong, and mistaken reliance upon them can prove to be devastating to your company's bottom line.

In recent years, the Ontario Superior Court has repeatedly ruled that whenever an employer unwittingly breaks the law by placing an employee on unpaid temporary layoff, without his or her prior authorization for doing so, that employer commits a fundamental breach of the employment agreement, thereby triggering both a termination of employment and an automatic obligation to pay Common Law pay-in-lieu of notice and statutory termination pay.

In addition to these sums, the courts have also ordered the employer to pay the unpaid wages that would have been paid to the employees during the period of temporary layoff had the notices of layoff not been issued in the first place. The courts' rationale for ordering employers to pay these unpaid wages is that the withholding of pay during that layoff period contravened the employment agreement and was therefore illegal. This is what occurred in the Ontario Superior Court's seminal decision in *Pavlovic v. Nikolic.*



In some cases, the total damages which the employer must pay for its mistake, in both unpaid wages and pay-in-lieu of notice, can amount to many tens of thousands of dollars per individual affected employee. Where a number of employees have been placed on temporary layoff, in inadvertent contravention of the caselaw, the total cumulative cost to the employer can easily amount to hundreds of thousands of dollars.

Regrettably, the fact that the employer's misinterpretation of the law arose from a reasonable misreading of subsection 56(2), and from their understandable lack of familiarity with the Ontario courts' caselaw interpreting that particular, relatively obscure, subsection of the *Act*, is of absolutely no succour in containing the damage done. The old adage '*Ignorance of the law is no excuse'* has been applied to this exact situation, to prevent employers from rescinding the deleterious effect of their notices of layoff, after the gravity of their mistake was belatedly explained to them by specialized employment counsel.

Even in the rare case where a company's employment contract presciently contains a clause explicitly permitting the employer to layoff its employees, that clause will be null and void if it violates the statutory parameters expressly enumerated in subsection 56(2). In *Elsegood v. Cambridge Spring Service (2001) Ltd.* and other decisions, the Ontario courts have held that once these specific parameters for temporary layoffs are exceeded in any way, an employee is considered to have been constructively dismissed, and thereby automatically becomes entitled to statutory termination pay and Common Law pay-in-lieu of notice. More specifically, in the recent decision *Gauthier v. Beresford Box Company Inc.*, the Ontario Superior Court expressly ruled that "*if a temporary layoff [exceeds the ESA parameters] then the Act treats the layoff at that juncture as a termination of employment, and that termination is a termination for all purposes, including the Common Law.*"

Many HR managers mistakenly assume that they can rectify their initial error, after it has been pointed out to them, by then hastily recalling the employees from the temporary layoff. Again, such is simply not so. The Ontario Superior Court has ruled that where the temporary layoff does not conform, *ab initio,* to the specific statutory parameters set forth in subsection 56(2), any subsequent recall of the employees neither cures the original illegality of the layoff, nor undoes the employer's constructive dismissal of those employees.

The Court has stated that once the statutory parameters in Subsection 56(2) have been inadvertently breached in any way, the employment relationship is immediately and irrevocably severed, triggering an irreversible entitlement to termination pay and Common Law pay-in-lieu of notice to all the affected employees. To borrow from one proverbial expression, *'once the horse is out of the barn, it is too late to shut the barn door'*.

That said, there are some situations where it may be worthwhile to recall an employee from temporary layoff, even though that unpaid layoff has already triggered a termination of employment due to the employer's breach of the statutory parameters listed in subsection 56(2). One such situation is where the employee is a long-serving employee who is owed significant Common Law notice. In such circumstances, if the employee accepts the recall and returns to work, the employer may then successfully argue that the employee has acquiesced to the initial breach of his employment agreement and has irrevocably waived his right to claim pay-in-lieu of notice for constructive dismissal. In such a situation, the employer's financial liability to that employee will be significantly reduced, if not wholly eliminated.

Given the ostensible contradictions between the plain wording of the temporary layoff provisions of the *ESA* and the way in which those layoff provisions have been interpreted by the courts, employers should always proceed with extreme care and deliberation before issuing notices of temporary layoff to any of their employees. Any prudent employer who foresees even a remote possibility of eventually laying off a portion of its workforce at some future date should consult with an experienced employment lawyer to ensure that temporary layoff clauses are immediately added to the termination provisions in the employment contract with those employees. The language of such clauses must be clear and unambiguous, and must fully comply with both the *ESA* and the latest caselaw of the Ontario Superior Court.

JUDICIAL UPDATE ON EMPLOYMENT LAW (cont'd from Page 2)

King v. 1416088 Ontario Ltd. 2015 ONCA 312

This past May, the Ontario Court of Appeal released a decision on when affiliated companies will be liable for the wages and severance obligations of each other's employees. The Court unanimously ruled that in calculating employment-related obligations, judges and arbitrators should "*pierce the corporate veil*" of an employer's separate but affiliated companies, and effectively treat all of those separate but affiliated companies as one single employer.

Prior to his termination, the plaintiff had worked his entire 38-year career for a succession of different, but affiliated, companies all under common ownership. Early in that career, while employed by the first company, he had signed a pension agreement entitling him to receive a pension upon retirement from that company. He later transferred to a series of other affiliated entities and ultimately to a second company, which eventually terminated him.

(Cont'd. on Page 7)

CORPORATE EXECUTIVES WHO 'MOONLIGHT' *BEWARE:*

You Can Be Fired With Cause For Transacting Some Types of Private Family Business After Hours!

Today, an ever-increasing number of Canadians are choosing to work at more than one job, either out of financial necessity or to pursue a hobby which they enjoy. This past May, Statistics Canada reported that there are now approximately 946,000 Canadians who hold down more than one job. For many of those Canadians, the second job is running a part-time personal, or family, business after-hours or on weekends.

Employees who do this must be careful that their part-time job does not put them into a potential conflict of interest with their full-time job; otherwise, their full-time employer may have just cause to terminate them. In June, this was vividly highlighted when the CBC terminated the employment of Evan Solomon, the high profile journalist and host of "*Power and Politics",* after it was revealed in the *Toronto Star* that he was working part-time in a family art brokerage business in his free time. In working after hours – or moonlighting – as a part-time art broker, Mr. Solomon earned significant commissions for helping to facilitate art deals with celebrities such as Bank of England Governor Mark Carney and Blackberry co-founder Jim Balsillie, whom he had met through his work at the CBC. The CBC fired Mr. Soloman on the grounds that his private business activities as an art broker had allegedly violated the CBC's written conflict of interest and ethics policies.

What does the law say about employee moonlighting?

Canadian employment law does not specifically preclude employees from moonlighting on the side by working for themselves or for another business after hours, unless this contravenes their employer's code of conduct or employment contract, or involves an inherent conflict of interest with the employee's day job. Where that moonlighting contravenes the code of conduct or the contract, or where there is an inherent conflict of interest, the employer may have just cause to terminate the moonlighting employee, without notice or pay-in-lieu of notice.

When will moonlighting involve an inherent conflict of interest?

Employees may be in a conflict of interest where they work after-hours for a competitor of their employer, or for someone with whom their employer does business. All employees have a duty to act in good faith and to be loyal to their employers. Working for a competitor or supplier, without their employer's knowledge or authorization, may potentially put them in breach of that duty.

Conflicts of interest can also arise in other ways, such as when an employee exploits a business opportunity which he learned of while working for his employer, or where he uses proprietary or confidential information which he acquired while in the course of his job, without obtaining prior authorization.

In addition, conflicts of interest can arise where the employee uses the employer's time or resources to further his own private business affairs, or alternatively where his private business results in absenteeism, persistent late arrival, lower productivity or scheduling issues which affect his employer.

A vivid illustration of this is provided by the recent decision of the British Columbia Supreme Court in *Patterson v. The Bank of Nova Scotia* 2011 BCPC 120 (CanLII). That case involved a bank employee who had been dismissed when she refused her employer's request that she quit her existing part-time job as a real estate agent. The Court found that her part-time real estate work placed her in a potential conflict of interest with her banking job because she stood to earn commissions from the purchase of new homes by her prospective real estate clients who *could* be seeking mortgages from the bank to buy the very homes which she was helping them acquire. The Court determined that her real estate work put her in breach of the bank's conflict of interest policies. It also determined that she was using her employer's time for her own business interests, as she was handing out business cards to bank clients during regular working hours at the bank. As a result, the Court concluded that by failing to quit her part-time real estate job, she gave the bank just cause to terminate her employment, without notice or pay-in-lieu of notice.

Even where the employee's moonlighting has not led to an *actual* conflict of interest, the mere *potential* of a conflict can amount to sufficient just cause to terminate the employee. This is because even a potential conflict of interest can justifiably cause an employer to lose

trust and confidence in the employee. By way of example, if a bank employee grants a loan to an individual with whom she has some financial involvement, the bank may reasonably lose confidence in her even though it suffers no actual loss.

However, not every potential conflict of interest between two jobs will give rise to just cause for dismissal. The potential for conflict must be clear and unambiguous. It is largely irrelevant whether the employee herself understands there to be a conflict of interest. Instead, the court will look to the following factors to determine whether or not a potential conflict of interest gives rise to just cause for dismissal: the employee's education, honest belief, position with the employer, the seriousness of the conflict, whether the employer has specifically prohibited the outside work, whether there was any dishonesty, and whether the employer's resources were used in the secondary business.

When will moonlighting contravene the employer's code of conduct or employment agreement?

Nowadays, many employment contracts contain a '*no-conflict'* clause expressly prohibiting employees from engaging in certain other forms of employment. A breach of that clause can constitute just cause for termination of the employee's employment.

In addition, employers often require their employees to sign codes of conduct containing provisions which explicitly limit their secondary employment options. If signed by the employees, for good and valuable consideration, such provisions become an integral part of their employment contract. Should the employees subsequently contravene those provisions, the employer may have the legal right to terminate their employment without notice or pay-in-lieu of notice.

What will likely happen to Evan Solomon?

Should Mr. Solomon grieve his employer's decision to dismiss him, an arbitrator would first need to determine if his art brokerage activities contravened the CBC's conflict of interest policies, as alleged by the CBC in the media. If such contravention of the policies did indeed occur, then the arbitrator would have to decide whether the termination was an appropriate form of discipline in view of all the relevant circumstances of Mr. Solomon's situation.

It is distinctly possible that the arbitrator might choose to reinstate Mr. Solomon to his job at the CBC, and substitute a lesser form of discipline, for two reasons. Firstly, the wording of the CBC's Code of Conduct, forbidding employees to "*use their positions to further their personal "interests",* is vague and potentially ambiguous, thereby making it possible for Mr. Solomon to argue that no reasonable employee would conclude that it prohibited him from selling art after-hours.

Secondly, it is not yet clear that Mr. Solomon's art brokerage activities ever had the potential to conflict with his work as host of *Power and Politics*, either by influencing his choice of whom to invite onto the show or what questions to ask of them. Based on the evidence revealed thus far in the media, it would appear that neither Mark Carney, nor Jim Balsilie appeared on *Power and Politics* either during, or after, the time Mr. Solomon was selling them art. As a result, his moonlighting activities may not have had any significant potential to conflict with his duties as host of his show.

Ultimately, whether the CBC is ordered to reinstate Mr. Solomon to his job will depend partly on (i) whether any of his immediate superiors at the CBC were previously aware of his after-hours business dealings, and (ii) whether he ever tried to conceal, or mislead the CBC about, those business dealings. If it is eventually revealed that one or more of his supervisors were aware of his private business activities and did nothing to stop him, then the CBC will likely be deemed to have acquiesced to Mr. Solomon's breach of the CBC's conflict of interest policies – a factor that would almost certainly guarantee his reinstatement to his former job. On the other hand, if the arbitrator determines that he was dishonest with the CBC, this would likely result in the dismissal being upheld because deliberately misleading one's employer, on a material fact, is a breach of trust, which is integral to the employment relationship.

As an employer, what steps can you take to reduce potentially harmful moonlighting by your employees?

As an employer, there are several ways you can prevent your employees from engaging in private business activities which conflict with your company interests. These include:

(i) Inserting a '*no conflicts*' clause into your company's employment agreement template;
(ii) Drafting conflict of interest guidelines for your employees; and
(iii) Creating a code of conduct which clearly defines what outside business activities your employees may and may not engage in.

To be enforceable, such documents must be clear and unambiguous. They must also be clearly communicated to, and then agreed to, by the employees. To be legally binding on current employees, it may be necessary to provide fresh financial consideration to those employees at the time that they sign the code of conduct, or guideline, or revised employment agreement. This is because in Canadian employment law, significant changes to an employee's employment obligations, even

if done with the employee's consent, are not generally enforceable against him in the absence of fresh consideration.

Given the inherent difficulty of enforcing codes of conduct and conflict of interest guidelines, a prudent employer will enlist the help of an experienced employment lawyer to assist with the drafting and execution of such documentation.

As an employee, what steps can you take to reduce the risk of being terminated as a result of your private business activities after-hours?
A wise employee who wants to engage in personal business activities on the side will discuss these with his employer. While the law does not require employees to disclose their personal business activities to their employer, it is prudent to do so. Such a discussion may quickly satisfy the employer that there is no serious potential for a conflict of interest to arise between the two jobs. Moreover, once the employee has fully and truthfully disclosed his personal business activities to the employer, and the employer does not forbid him from continuing with them, the employer will be precluded by its inaction from subsequently claiming that those activities amounted to a conflict of interest, and that they constitute just cause for dismissal.

JUDICIAL UPDATE ON EMPLOYMENT LAW (cont'd from Page 4)

No pension agreement existed with that second company. When he asked the second company to honour his pension entitlements under the original pension agreement, his request was denied on the grounds that the first company no longer had assets, and that the second company did not owe him anything under that agreement because it was a separate corporate entity which had not been a party to the original pension agreement. The employer argued the position that the various affiliated companies were not common employers of the plaintiff and that only the company which had actually signed the agreement should be liable, particularly because the second company had not yet even come into existence at the time of the plaintiff's employment with the first company. The Court rejected these arguments and ruled that all of the companies were so interconnected that *each one* was jointly liable to pay the plaintiff the money owed pursuant to the original pension agreement he had signed with the first company.

This case is instructive for employers in that it illustrates how affiliated and successor employers may be fully liable for each other's financial obligations to its terminated employees, even in situations where they may not themselves have been a party to the applicable employment agreement.

QUIZ: 'JUST HOW SAVVY ARE YOU AT HR?'

(Can you score 5 out of 5?)

IS IT TRUE THAT……

1. Employees who earn a salary rather than an hourly wage cannot claim overtime pay; True / False

2. Managers and supervisors are never eligible to receive overtime pay; True / False

3. You can dismiss a probationary employee at any time, without notice, pay-in-lieu of notice or statutory termination pay, so long as this is stipulated in his employment contract. True / False

4. You can put an employee back on probation at any time. True / False

5. It is illegal to terminate an employee for repeated absenteeism arising from most illnesses. True / False

(Answers on the back page of this Newsletter)

ANSWERS TO QUIZ:
'JUST HOW SAVVY ARE YOU AT HR?'

1. **FALSE:** In Ontario, all employees who work in excess of 44 hours per week are entitled to overtime pay, regardless of whether they are remunerated on an hourly basis or by a fixed annual salary. When it comes to overtime pay, there is absolutely no difference between a salaried employee and an hourly wage employee;

2. **FALSE**: Pursuant to the *ESA*, managers and supervisors enjoy the right to claim overtime pay unless the majority of their work is supervisory or managerial in nature and they only perform non-supervisory or non-managerial tasks on an irregular or exceptional basis. Many employees with the work title "*Manager"* or "*Supervisor"* are exempted from this rule and are entitled to claim overtime pay for hours worked in excess of 44 hours a week;

3. **FALSE:** The *Employment Standards Act* requires you to pay probationary employees at least one week of termination pay if you dismiss them after the end of their third month of probationary employment, regardless of what is stipulated in your employment contract;

4. **FALSE:** Once an employee has completed his probationary period, you cannot put him back onto probation unless he consents to your doing so. Absent such consent, any directive that an employee's status has reverted to that of a probationary employee may amount to constructive dismissal, thereby exposing you to a potentially significant claim for pay-in-lieu of notice;

5. **TRUE:** The *Ontario Human Rights Code* prohibits employers from dismissing employees for repeated absenteeism arising from most illnesses, unless the employer can show that the continued absenteeism would actually cause it "*undue hardship".* In practice, employers have rarely been able to prove, to the satisfaction of a tribunal or court, that such hardship caused to them by chronic absenteeism is so great as to be "*undue".*

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