Top 10

Employment & Labour Issues for Employers

Blakes

Table of Contents

1. Accommodation in the Workplace

OVERVIEW

Employers have a duty to accommodate employees' needs based on those grounds protected under federal and provincial human rights legislation. All employers are required under human rights legislation to make reasonable, good faith attempts to accommodate employees to the point of undue hardship.

Duty to Accommodate

An employer's duty to accommodate is far-reaching and may take a variety of forms depending on the particular workplace and the specific needs of the employee being accommodated. Accommodation can range from structural changes to facilities or equipment, to the provision of additional support to an employee, to the altering of work schedules or rules, or to the granting of absences or rehabilitation programs. As a result, the costs of accommodation may vary widely. In each instance, however, the duty to accommodate includes the procedural duty to investigate and consider accommodation, as well as the substantive duty to see that reasonable accommodation does, in fact, occur.

Undue Hardship

The duty to accommodate is qualified: the employer is required to accommodate any employee only to the point of "undue hardship." However, this threshold is quite high. Not every workplace disruption or interference will constitute undue hardship for an employer. The Supreme Court of Canada has ruled that while an employer is not required to accommodate to the point of impossibility, any inconvenience or disruption short of undue hardship will not relieve an employer of its obligation to accommodate.

CURRENT ISSUES AND TRENDS

Family Obligations

"Family status" is a prohibited ground of discrimination under most provincial human rights legislation in Canada and is a rapidly evolving area of the law. Trends in case law indicate that employers can be found liable for discrimination if they fail to adequately address employees' needs regarding family obligations, such as caring for children, a spouse, or parents. However, there are two competing views as to the extent a workplace standard must interfere with a family obligation to amount to discrimination:

- The first approach requires that a workplace standard must interfere with an employee's ability to fulfill a substantial family obligation in a realistic way
- The second approach requires that a workplace standard must interfere with an employee's ability to fulfill a substantial family obligation in a serious way

The law is still developing as to which test for prima facie discrimination on the basis of family status will be adopted by decision-makers. Regardless of the test ultimately applied, a key consideration will be whether an employee can demonstrate that they have a substantial family need that cannot be met without employer accommodation.

As a result, any attempts by an employee to facilitate their own accommodation will always be a relevant consideration. Employers should recognize that the law in this area is unsettled and take meaningful steps to consider the reasonable requests of employees for accommodation in respect of family obligations. When faced with an employee alleging that work requirements are interfering with family obligations, an employer wishing to protect itself against discrimination claims should:

- Listen to the employee's request or allegations
- Consider the employee's efforts to address the alleged interference with family obligations
- Consider the impact and hardship on the business if the employee's requests are granted
- Consider whether the employee's requests are simply preferences or are actual needs
- Document all steps taken to address the employee's requests or allegations

This is not to say that all such requests for accommodation must be granted. However, an employer who meaningfully considers an employee's requests and who makes a bona fide attempt to determine and communicate to its employee why accommodation is or is not possible is more likely to establish that it has met its duty to accommodate.

Drug and Alcohol Testing

Another rapidly evolving area of the law is the limits on drug and alcohol testing in the workplace. Employers who implement lawful drug and alcohol policies should consider the interaction between drug and alcohol testing and employee human rights. Since drug or alcohol addiction is a disability, it is afforded protection under human rights legislation. As such, adverse treatment or termination of employees with a drug or alcohol addiction will attract human rights scrutiny. Employers who do test employees for drugs and alcohol must therefore ensure that they have programs or policies in place to discharge their duty to accommodate employees suffering from drug or alcohol addiction.

IMPLICATIONS FOR EMPLOYERS

An effort to accommodate the needs of employees up to the point of undue hardship is required by employers under human rights legislation. Although it is helpful to review current human rights decisions speaking to the employer's duty to accommodate employees based on the protected grounds, there is no set formula for accommodation of employees, as each person has unique needs and abilities.

Prudent employers will typically benefit from having a clear accommodation policy and ensuring those responsible for its application comply with its terms. Employers are encouraged to focus their efforts on the careful design, implementation and communication of accommodation policies and practices in order to reduce the likelihood of human rights claims. Employers are also well advised to consider whether the implementation of a particular workplace standard or rule could have a disparate impact on a protected group under human rights legislation, such as workers with disabilities. If the workplace standard or rule suggests evidence of differential treatment based on a prohibited ground, employers are encouraged to consider other approaches or means that may be implemented to achieve their desired objective and that do not trigger human rights concerns.

2. Restrictive Covenants in Canada

OVERVIEW

Post-employment restrictive covenants are contractual terms designed to protect a business from competition by a former employee that could harm the business. In the absence of contractual restrictive covenants, former employees — except fiduciary employees — are free to compete with their former employer, provided that confidential information of the former employer is not used. The following are some of the most common questions we receive regarding restrictive covenants.

Are Post-Employment Restrictive Covenants Enforceable in Canada?

Yes, but Canadian courts will not enforce restrictive covenants that unnecessarily restrict an employee's freedom to earn a livelihood after the end of an employment relationship. A former employer must demonstrate to the court's satisfaction that the scope of the covenant is "reasonably necessary" for the protection of the business. What is "reasonably necessary" depends on the nature of the business, its geographic reach, and the former employee's role and responsibilities in that business. Additionally, in Quebec, the Civil Code provides that a non-competition clause will not be enforceable if the employer terminates an employee's employment without cause.

What Are the Differences Between a Non-Competition Covenant and a Non-Solicitation Covenant?

While the generic term "non-compete" is often used to describe either or both non-competition covenants and non-solicitation covenants, the two covenants serve different purposes. A non-competition covenant prohibits a former employee from becoming engaged in a business that competes with the business of his or her former employer. A non-solicitation covenant prohibits a former employee from soliciting the customers or employees of his or her former employer. However, sometimes the line between the two types of covenants is blurred by "no-deal" provisions, which restrict employees from having dealings with customers even absent solicitation.

Which Type of Covenant Is Most Likely to Be Enforced?

A non-solicitation covenant. Canadian courts will only enforce non-competition covenants in "exceptional" circumstances, for example, where an employee is essentially the "face" of an employer's business to its customers, such that those customers would follow that employee to a competitor after termination of the employment relationship, even if they were not solicited by the former employee.

In the absence of exceptional circumstances, courts typically find that non-solicitation covenants provide adequate protection to an employer's business interests and will accordingly refuse to enforce non-competition covenants on the basis that they are not commercially necessary.

What Are Best Practices for Drafting Non-Competition Covenants?

A non-competition covenant should only prohibit an employee from becoming engaged in business activities that are the same as or similar to the activities the employee was engaged in at the time of termination. For example, a non-competition covenant that prohibits a former employee from working for a competitor even in a non-competing line of business or in a completely different role will not ordinarily be enforced.

A non-competition covenant should have a geographic scope no broader than the areas in which an employer is vulnerable as a consequence of the employee's departure. A covenant with no geographic scope or a worldwide geographic scope will not be enforced by a Canadian court. Generally, limiting the covenant to the specific geographic areas in which an employee actually performed services on behalf of the business is advisable.

A non-competition covenant should last no longer than is necessary for an employer to regain any competitive advantage lost when an employee departs. Courts will not enforce a restrictive covenant that does not contain any time limit. Courts will consider evidence about the company's business (e.g., information about sales cycles, contract renewal periods, and the time it will take to replace a key employee) to determine what time period is reasonable. In general, non-competition covenants with durations of 12 months or less are more likely to be enforced by a Canadian court than longer covenants, although longer covenants may still be appropriate for senior executives.

What Are Best Practices for Drafting Non-Solicitation Covenants?

Non-solicitation covenants should only cover solicitation of existing customers or prospective customers with whom the employee had a business relationship at the time of termination or in a relevant time window prior to that date.

Only solicitation on behalf of a competitive business should be prohibited by a non-solicitation covenant (i.e., it is not reasonable to prohibit the solicitation of customers where such solicitation would not result in a reduction in the company's business).

Restrictions on employee solicitation in a non-solicitation covenant should only cover employees with whom the employee had contact (i.e., not all employees of a global company).

The restrictions on non-solicitation should also be for a limited time period, with a duration of 12 months being the most common.

Is Blue Pencilling Permitted in Canada?

No. Canadian courts will not "blue pencil" or read down restrictive covenants that contain overbroad provisions to render those covenants enforceable. This is the principal reason why it is important to tailor restrictive covenants to the specific employee, position and business, and draft the restrictions narrowly.

3. Guidelines for Workplace Investigations

OVERVIEW

Both complaints and workplace investigations should be handled in a fair, objective manner focusing on assessing the facts at hand and avoiding hastily drawn conclusions and whispered conversations at the water cooler. Assessing complaints and performing workplace investigations in a thoughtful, considerate and systematic manner is not only good for the employer's work environment and employee morale, it is also effective to mitigate risk. An employer who fails to properly investigate a complaint of discrimination may ultimately be liable to the victim under applicable human rights legislation. On the other hand, claims can also arise if an employee is improperly accused of or dismissed because of allegations of wrongdoing that cannot be substantiated. An employer can manage risk by implementing, communicating and enforcing clearly worded policies setting out workplace rules, and conducting thorough and fair workplace investigations into alleged breaches of those rules.

KEY CONSIDERATIONS IN A WORKPLACE INVESTIGATION

Assess the Complaint

An employee complaint made pursuant to an employer's reporting procedures should automatically trigger an investigation. However, where a complaint is quickly determined to be frivolous or vexatious, no further inquiry is required.

An employer should consider who appears to be involved in the events giving rise to the complaint, including current, former and non-employees, and who may have evidence relevant to the complaint. An employer should also determine what kind of wrongdoing is suspected and what laws and employer policies are engaged.

Determine the Objectives of the Investigation

The employer's objectives in conducting the investigation will depend on the employer's legal obligations in connection with the complaint and the impact on the business should the complaint be substantiated. For example, the employer will want to consider its obligations under human rights legislation, the potential for criminal prosecution of the employee in question, and the potential for dismissal litigation. In the event that a complaint is substantiated, an employer will generally want to impose some kind of discipline and take steps to avoid similar wrongdoing in the future.

Determine Whether to Involve a Third Party

An employer may wish to retain legal counsel in connection with the investigation, which may, in some cases, protect the findings from disclosure based on solicitor-client privilege. The employer will also have to determine whether the investigation will be conducted in-house or whether to engage an external investigator, possibly one with specialized expertise in areas such as computer forensics or forensic accounting. An external investigator may be perceived as more neutral, while an in-house investigator may have a better understanding of the employer's corporate culture.

Determine the Status of the Parties

If the complainant does not feel safe or is concerned about reprisals, it may be appropriate to transfer him or her to another area of the workplace, make a change in reporting relationships or provide a paid leave of absence. In extreme circumstances, the complainant may be able to apply for benefits through the employer's disability program or Employment Insurance. Workers' compensation benefits may be available to the complainant in very limited circumstances where there has been an acute and traumatic event in the workplace.

In most cases, there should be no change to the working conditions of the subject of the complaint during the course of the investigation, so as to avoid a claim that the employer pre-judged the outcome. However, where the substance of the allegations gives rise to concern for the safety of the complainant and other employees, the employer may consider placing the subject on a paid leave of absence pending the conclusion of the workplace investigation.

Conducting Witness Interviews

Order of Interviews

It is common for the investigator to interview the complainant, followed by any witnesses suggested by the complainant, followed by the subject of the complaint and any witnesses suggested by him or her. However, the facts of a particular complaint may suggest a different ordering. An investigator will generally want to speak to those individuals with direct, first-hand knowledge of the facts at hand.

Best Practices in Interviews

Each witness should be informed that the interview process is confidential and that, depending on the nature of the complaint and the potential for legal proceedings, he or she may be called as a witness. To maintain the integrity of the investigation process and to protect employee privacy, each witness should be provided with only those details regarding the nature of the complaint that are necessary to make the interview meaningful.

It is good practice to ask a witness to review notes taken during the interview by either the investigator or an observer and sign them to indicate that they accurately reflect the discussion that took place. Alternatively, a witness statement may be prepared and presented to the witness to sign at a later date. Witnesses should also be advised to contact the investigator if they have any additional information, corrections or clarifications to make to the facts discussed in the interview.

Since memories fade with time, it is important to meet with witnesses and conduct interviews as soon as possible after the alleged incident or event.

Interviewing the Complainant and the Subject

The investigator will generally want to reassure the complainant that the employer is taking the allegations seriously, and explain that further information is needed to conduct a complete investigation.

The subject of the complaint should be given the opportunity to fully respond to the allegations made. In addition, the investigator should reassure him or her that the complaint is being dealt with in as confidential a manner as possible. Where the complaint concerns allegations of discrimination under human rights legislation, the investigator should deliver a caution that reprisals in response to such complaints are prohibited.

Dealing with Missing Evidence

The investigator should have the ability to review records belonging to the employer, such as employee files, email messages sent to and from the employer's computer system and expense reports. However, an investigator does not have the power to compel an employee or third party to provide records that belong to them. In addition, the investigator may need to be cognizant of privacy legislation protections that may apply to the collection, use and disclosure of certain information relevant to the investigation.

Where a witness refuses to provide relevant documents without providing a reasonable explanation for such refusal, the investigator may choose to draw an adverse inference against that witness.

Finalizing the Investigation

The investigator's role is to make findings of fact, including with respect to witness credibility. These factual findings will then allow a determination to be made by either the investigator or the employer, informed by legal advice, as to whether the complaint is substantiated or unsubstantiated, or whether the investigation is inconclusive. The standard of proof used in a workplace investigation is usually the "balance of probabilities", meaning that it is more likely than not that the alleged misconduct took place. However, it may be advisable for employers to require a greater degree of certainty where the conduct at issue is criminal in nature.

The report produced as the result of a workplace investigation may become evidence in further legal proceedings, such as an employee grievance, human rights complaint or civil action. It is therefore important that the investigation report be carefully drafted.

While the outcome of the investigation should be communicated to the parties, the final report should generally be circulated only amongst the final decision-makers.

Taking Action

If the complaint is substantiated, the employer should take action to:

- Prevent the harassment, fraud or misconduct from recurring. This objective can often be achieved through training and education of the employer's employees, which may include counseling for the respondent.
- Correct the negative impact of the incident on the complainant, for example, by accommodating any requests for transfer, relocation or changes to reporting structure.
- Discipline the subject of the complaint in a manner proportional to the severity of the misconduct, up to and including dismissal.

If the complaint is not substantiated, the employer should notify the parties accordingly and explain how this conclusion was reached. The relationship between the parties, or the parties and members of management, may have broken down during the investigation and may need to be rehabilitated.

4. Background Checking in Canada

OVERVIEW

Conducting background checks into the educational, employment, criminal or credit history of candidates for employment can form part of a company's recruitment processes. Below is a brief overview of the Canadian legislation to be considered when implementing policies and procedures for background checking in Canada.

WHAT LEGISLATION MUST BE CONSIDERED BEFORE CONDUCTING BACKGROUND CHECKS?

Privacy Legislation

Federal privacy legislation governs the collection, use and disclosure of personal information in the commercial and consumer context. However, the privacy legislation applicable to the employment relationship depends on the province of employment, unless a business is subject to federal employment and labour law. Comprehensive legislation regulating collection, use and disclosure of employee personal information in the private sector currently exists in Alberta, British Columbia, Quebec and federally. Manitoba has also introduced comprehensive privacy legislation, which is not yet in force. Even where collection is lawful, employee personal information collected as part of background-check processes should only be used for the purposes collected and should be subject to appropriate confidentiality safeguards.

Human Rights Legislation

Each province in Canada and the federal jurisdiction have enacted human rights legislation that prohibits discrimination in employment based on specified individual characteristics, beliefs and relationships known as "prohibited grounds of discrimination." The human rights statute applicable to a particular business limits an employer's ability to use information collected during a background check when making employment decisions if that information relates to a prohibited ground of discrimination.

In addition to the common prohibited grounds of discrimination (race, colour, religion, age, sex, sexual orientation, marital status, family status and disability), some Canadian jurisdictions also list as prohibited grounds criminal convictions that are unrelated to the position sought, criminal convictions for which a pardon has been obtained and/or convictions of an offence under provincial law.

WHAT TYPES OF BACKGROUND CHECKS CAN EMPLOYERS CONDUCT?

Reference and Educational/Professional Credentials Checks

Reference checking and verifying educational and professional credentials is permissible in Canada. Where privacy legislation applies to the employment relationship, consent to the collection and use of this type of personal information must be obtained.

Credit History Checks

The privacy concerns relating to credit history checks are similar to those arising when collecting and using information related to a candidate's criminal record. Requiring that candidates consent to a credit history check may be unlawful in those jurisdictions in which limits are imposed on the scope of pre-employment inquiries to what is reasonable in the circumstances. Employers who are hiring in these jurisdictions should carefully evaluate whether the credit information it seeks is reasonably related to the position for which the applicant is being considered.

Pre-employment credit checks have been specifically challenged in Alberta. In a 2010 ruling, the Alberta Office of the Information and Privacy Commissioner found that pre-employment credit checks for a retail employer were not reasonable as there was no evidence that an applicant's credit history provided reliable information about whether a job applicant would commit theft or fraud.

Criminal Record Checks

Some privacy legislation imposes limits on the collection of background check information to what is reasonable in the circumstances, having regard to the purposes for collecting the information and the position the job applicant is seeking. This means that in some jurisdictions, such as Alberta, British Columbia, Quebec and the federal jurisdiction, employers may be only permitted to seek consent and conduct more limited criminal record checks, i.e., those checks that are reasonably required, in order to evaluate the candidate for the position sought.

In several Canadian jurisdictions, human rights legislation restricts an employer's ability to make employment decisions on the basis of an individual's record of convictions, which is defined such that the use of information regarding a criminal conviction that is unrelated to the position sought is prohibited. In Ontario and the federal jurisdiction, an employer cannot make an adverse job decision based on a criminal conviction for which a pardon has been obtained or a provincial offence. Even in provinces that do not prohibit discrimination in employment on the basis of an individual's record of convictions, a criminal record check may reveal information related to a different prohibited ground of discrimination. For example, certain criminal convictions (such as driving while impaired) can signify drug or alcohol dependency, both of which are considered "disabilities" under Canadian human rights legislation.

5. Dos and Don'ts of Interviews

OVERVIEW

Employers may not refuse employment or otherwise discriminate against a person on grounds protected by applicable human rights legislation. Protected grounds vary by province, but generally include (without limitation) race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation and age. Questions relating to any prohibited grounds should be avoided as an applicant may draw the inference that the hiring decision was based on something other than merit. This can occur even if the employer did not intend to discriminate. Employers must be aware of how the interview process, which may include in-person questions, written exams, and application forms and background checks, may contain subtle forms of discrimination that violate human rights law. During the hiring process, employers also have a duty to accommodate applicants' needs related to any particular protected ground. Unless the accommodation results in undue hardship for the employer, a failure to accommodate may give rise to a claim of discrimination.

A human rights complaint exposes employers to potential reputational damage in addition to potential monetary damages. In most jurisdictions, an individual would only have to point to facts that could establish discrimination. After that, the employer then has to prove there was no discrimination, which leads to the unenviable position of an employer having to defend its hiring practices publicly.

In addition, employers should be conscious that the interview process is further restricted by privacy laws. Generally speaking, an employer should only collect, use and disclose personal information for legitimate purposes and only as much personal information as is necessary for such purposes. All forms of personal information may only be collected with the consent of the applicant. In interviews, consent should be implied for most questions related to the position. In any event, employers should try to collect only the information necessary to make the hiring decision. Over-collection is prohibited and can lead to problems for employers.

THE DOS AND DON'TS

Before the Interview

DO:

- **Create a uniform hiring process for all applicants.** Draft interview questions in advance based on the essential duties and requirements of the position. Develop the "answers" and assess applicants based on these objective criteria. Ask all applicants the same questions. These measures guard against informal subjective assessments entering into human-resource decision-making.
- **Prepare a panel of interviewers to assess applicants according to the hiring process.** A panel assessing an applicant's answers allows for a more diverse and objective perspective. A panel will also provide multiple witnesses to the interview, one of which should record thorough notes.
- **Offer to accommodate an applicant, if he or she requires accommodation, before the interview.** Applicants are generally responsible to inform potential employers of their needs and providing sufficient detail for the employer to respond accordingly. Once aware of the need to accommodate, employers should cooperate with the applicant in creating an interview or hiring mechanism that addresses the duty to accommodate arising under human rights legislation.

DON'T:

- **Make hiring decisions on an informal or *ad hoc basis*.** While an informal conversation with an applicant may be appealing, an uncontrolled, subjective process can lead to subconscious bias and, in some cases, discrimination allegations. Having a plan and a written procedure before an interview will give structure and objectivity to questioning without eliminating the desirable conversational aspects.
- **Be unprepared.** An interviewer who is unprepared for an interviewee will tend to focus on a person's superficial characteristics rather than their merit.
- **Use social media screening without the consent of the applicant and without considering whether you need such personal information.** An employer must obtain an applicant's consent to collect their personal information. Personal information on social media is no different. An employer should not attempt to skirt privacy rules by using their personal account to screen an applicant or rely on a third party to conduct the screening.
- **Rely on the information on social media to the exclusion of traditional sources of personal information.** In general, employers should be wary that the information obtained on social media may be unreliable, inaccurate, and usually unnecessary.

During the Interview

DO:

- **Ask an applicant about his or her qualifications, relevant experience, training and previous positions.** Human rights and privacy laws do not limit the right of employers to obtain legitimate information about the people they may hire. All interview questions and topics must be designed to elicit job-related information concerning the applicant's relevant knowledge, skills and ability to perform the key duties of the position.
- **Describe the job requirements such as overtime, weekend work or travel.** Framing questions in terms of job requirements is an effective way of removing discriminatory elements in questions.
- **Take notes, take notes, take notes.** Taking and retaining notes and other written records of the interview will provide contemporaneous evidence in any discrimination claim before a human rights tribunal or the courts. While taking notes cannot immunize employers to claims, once started, such evidence can be a powerful tool to defend a claim.

DON'T:

- **Ask questions that provide information regarding a prohibited ground of discrimination.** The following is a non-exhaustive list of general topics to avoid in an interview:

  - *Race, colour, ancestry or place of origin*

    If you need information about an applicant's immigration status, simply ask whether the applicant is legally entitled to work in Canada. Avoid asking other questions related to a person's educational institution, last name or any clubs or affiliations that are designed to indicate their race, ancestry or place of origin.

  - *Religious beliefs or customs*

    Employers may not ask about a person's religious beliefs or customs. If you need information about when an applicant can work, ask whether he or she can work overtime or weekends if that is a legitimate job requirement.

  - *Sexual orientation*

    There is rarely (if ever) a reason you need to know an applicant's sexual orientation. Questions about a person's personal relationships should be completely avoided in almost all cases.

  - *Marital or family status*

    Instead of asking about a person's family or marital status, simply ask if the applicant can work the hours required of the position or if they are able to travel or relocate.

  - *Physical or mental disability*

    Avoid asking about an applicant's general state of physical or mental health or any history of sick leaves, absences and workers' compensation claims. Employers may, however, ask the applicant whether they are able to perform the essential duties of the position and describe the physical and mental requirements of the position.

  - *Gender*

    Avoid questions about gender, including questions about pregnancy, breastfeeding, childcare arrangements and future plans to have children.

  - *Age*

    While employers may ask an applicant for their birthdate on hire, the age of the applicant is rarely relevant unless there is a question as to whether the applicant has reached the legal working age, which varies from province to province.

  - *Criminal or summary convictions*

    The permissibility of questions relating to criminal history will vary from province to province. In general, employers may ask the applicant about their criminal record where there is a legitimate reason to know, such as when the job involves a position of trust or working with vulnerable persons.

  - *Former names*

    Avoid asking a person about their former names unless needed to verify previous employment and education records. Avoid asking about names to determine someone's origin, their maiden name or if they are related to another person.

  - *Language*

    What languages an applicant speaks may cross the line if they are really questions about race, place of origin or ancestry. The exception is, obviously, where the ability to communicate in certain languages is specifically required for the position.

  - *Source of income*

    It is recommended that employers avoid asking about an applicant's source of income, as this is irrelevant and some sources have a social stigma attached to them, such as social assistance, disability pension and child maintenance.

- **Ask questions designed to illicit irrelevant information or information unrelated to the legitimate job requirements.** Privacy laws require that employers only collect personal information that a reasonable person would consider appropriate in the circumstances. Again, the employer must only do so with consent of the applicant. The best practice is to only collect information that is reasonably necessary to make a hiring decision.

After the Interview

DO:

- **Keep the interview notes and documentation for as long as possible.** Different jurisdictions have different limitation periods in relation to bringing human rights or privacy complaints or other types of litigation. Employers should keep all materials from the hiring process for as long as necessary to comply with applicable legislation and protect themselves from any possible litigation.
- **Ask the selected individual(s) for further information.** Once hired, it is permissible to ask a person for further documentation necessary to maintain and establish the employment relationship if there is a legitimate need for that information. When an offer of employment is accepted (or conditional on certain checks being completed with the consent of the individual), it will generally be necessary to collect an employee's birth date, social insurance number, personal contact information and all other personal information needed to establish the relationship, including information needed to enroll the employee in benefits plans and payroll.

6. Balancing BYOD Programs with Expectations of Privacy at Work

OVERVIEW

The workplace practice of bring your own device (BYOD) has hit the mainstream as more and more employees use their own mobile electronic devices to connect to corporate networks. Employees have a reasonable expectation of privacy with regard to the mobile devices used as part of a BYOD program. However, this expectation should not be unlimited. There is a fine balance between an employee's expectation of privacy and the employer's legitimate business need to manage and control its business information.

GETTING STARTED

When implementing a BYOD program, an employer will generally want to ensure that it includes a BYOD policy that sets out the employer's practices and expectations when it comes to the use of personal mobile devices for work purposes. As with any new policy or program, the employer will need to consider other corporate policies so that the BYOD policy can be properly integrated. This may include policies dealing with remote access via home computers, "corporate-owned" smartphones, document retention, acceptable use of the employer's network, compliance and ethics, litigation holds, social media, harassment and discrimination, and employee privacy policies.

SCOPE OF BYOD PROGRAM

Employers will want to consider which devices will be included in the BYOD program and who will be entitled to participate in it. Consideration should also be given as to how many devices each participant may have in the program, what the approval process for those wishing to participate in the BYOD program will be, what support the employer will provide in respect of devices and to users of those devices, and of course, the financial aspects of the employer's BYOD program. Employers may also consider whether to offer an alternative company-owned device for those employees who do not wish to participate in the BYOD program. Employers will want to keep an up-to-date inventory of participating devices. This allows the employer to keep track of where its data and business information resides.

PRIVACY CONSIDERATIONS

In Canada, privacy rights are recognized through the patchwork of privacy legislation and common law and arbitral jurisprudence that impose obligations on employers with some variations depending on the nature of the employer and the jurisdiction of employment. Generally, there will be some restrictions placed on the collection, use and disclosure of employee personal information and employers will want to consider the following guidelines:

- **Limiting Collection.** Implement technological or other methods of limiting the collection of non-business-related employee personal information from the personal mobile device. Consider options to segregate the business data from the personal data on the device.
- **Limiting Disclosure.** Only authorized personnel should have access to the personal information collected from mobile devices. Safeguards should be put in place to limit unintentional or unauthorized disclosures of personal information. Policies should also notify the employees as to whom the information will be disclosed, including potentially to law enforcement agencies when a breach of law is suspected.
- Consent and Notification. In any BYOD program, employers will usually install software onto the personal device that provides the employer with access to the business and sometimes other data on the device. An employer's right to access or monitor a mobile device may be constrained by the fact that the device is not owned by the organization. Obtain express consent and provide written notification to employees about the purposes for collecting, using and disclosing data on the device. In addition, consent and notification is required for remote or other wiping of the device, particularly since such functions might also delete the employee's personal information or property.
- Expectation of Privacy. Employees should understand what expectation of privacy they should have when using a personal mobile device that is subject to the BYOD policy, and should understand what monitoring the employer will conduct and for what purposes. In order to effectively manage an employee's expectation of privacy and any consent requirement, an employer will need to be very clear—through not only its policies, but also its practices—about the circumstances under which and the purposes for which the employer may monitor employee device usage and what uses the employer may make of information that it accesses, views or collects.

SECURITY-RELATED CONSIDERATIONS

An employer's BYOD program must consider any security-related requirements or practices relevant to participating devices and users. The primary focus here is preservation of the confidentiality of the employer's business information while recognizing the privacy of any personal information within the possession or control of the organization.

- **Security Controls.** Decisions will need to be made regarding which user authentication protocols should apply to participating devices and users, which data encryption protocols should be mandated, and which antivirus protection measures should be implemented.
- **Restrictions on Apps.** Employers must consider which controls or restrictions are appropriate in relation to apps used by participating users for business purposes.
- **Restrictions on Clouds.** Employers need to know which "clouds" their business information resides in and whether the information in those clouds is subject to reasonable and appropriate security safeguards, taking into consideration the nature of the information being stored and the employer's legal obligations—whether under statute or pursuant to its contractual obligations.
- **Back-ups.** Since employees will have personal information and property (photographs, music, etc.) on the device, consideration should be given as to the issue of back-ups and whether all of the device's data can be backed up onto a computer that is not part of the organization.

IMPLEMENTATION

When introducing the BYOD program or at the time of hire, employers will want to provide training on the policy and have the employees sign the consent or acknowledgment form. A BYOD policy will have little impact or enforceability if the employees are not made aware of the policy and provided with some training or orientation on its terms and conditions. In addition to the foregoing, as with other policies, employers will want to specify in the policy disciplinary and other actions that may be taken when an employee does not comply with the expectations set out in the policy, and be consistent in the application of the policy to all employees who participate in the BYOD program.

7. Obligations When Terminating Without Cause

OVERVIEW

Understanding an employee's entitlements upon a without cause dismissal is an essential step towards avoiding unnecessary wrongful dismissal claims. Canadian law imposes obligations on employers to provide their employees with certain entitlements in the event of a without cause dismissal. Since there is a very high bar for establishing "just cause" — which generally permits an employer to provide no notice or other entitlements upon dismissal — the vast majority of terminations in Canada will be without cause.

REASONABLE NOTICE OF TERMINATION

In the absence of an enforceable termination clause in a written employment contract, an employee's termination entitlements will be governed by Canadian common law (with the exception of Quebec, discussed below). One obligation imposed upon employers by the common law is to provide employees with reasonable notice of termination of employment, or pay in lieu of reasonable notice, in the absence of just cause for dismissal.

There is no fixed formula for determining reasonable notice in any given case. There are, however, several factors that courts consider when determining reasonable notice, including the availability of similar employment as well as the employee's age, length of service, position and level of compensation. In essence, the courts aim to identify, on a case-by-case basis, the length of notice that the employee will need to find alternate work of a similar nature. By way of example, reasonable notice generally ranges from a few weeks up to 24 months depending on the above factors, but there are exceptions.

The concept of reasonable notice signifies actual or written notice. In principle, the employee is expected to continue his or her active employment during the applicable notice period. As an active employee, the individual would usually be entitled to all elements of his or her compensation package during the notice period. However, employers typically provide an employee with pay in lieu of notice or a "package" upon termination of employment rather than actual or working notice. Thus, in the pay in lieu of notice scenario, to mirror what they would have received had they been provided with actual notice, employees are generally entitled to payment reflecting all elements of their compensation package, including, for example, salary, benefits and pro-rated bonus or other incentive compensation (subject to the terms of any applicable policies or plans).

Written employment agreements may modify and/or limit an employer's common law obligations. In general terms, where there is a proper and enforceable employment contract that specifies what the employee will receive upon termination of employment, then it will be the employment contract — and not the common law — that the employer will rely on in determining an employee's entitlements upon termination. However, any contract that a court finds as providing less than the employee's minimum statutory entitlements will be viewed as unenforceable and an employee in such a scenario will be entitled to reasonable notice of termination.

QUEBEC CONSIDERATIONS

Common law principles are not applicable in Quebec. Rather, employers' obligations are established by the Civil Code of Québec, which provides that an employee can claim reasonable notice (or compensation in lieu of notice) of the termination of his or her employment, such that an employee's entitlements upon a without cause dismissal in Quebec are substantially similar to those of employees in the common law provinces and territories.

That being said, Canadian employers should be aware of the fact that there are unique legislative and other requirements relating to employment in Quebec that are not present in the common law provinces and territories.

STATUTORY MINIMUM STANDARDS

Employment standards legislation in all Canadian jurisdictions sets out minimum notice (or pay in lieu of notice) obligations for employers when they dismiss an employee without cause. It should be emphasized that the statutory minimums prescribed by employment standards legislation with respect to notice and severance are just that — minimum standards. They represent the lowest possible amounts that an employee is entitled to receive on dismissal without cause. An employer cannot contract out of the statutory minimum entitlements.

Generally, an employee's entitlement to statutory minimum notice of dismissal increases with his or her length of service. For example, in Ontario, employees are generally entitled under statute to one week's notice (or pay in lieu of notice) for each completed year of employment, to a maximum of eight weeks. Although employees' entitlement to notice of termination of employment varies slightly from province to province, employment standards legislation across the Canadian jurisdictions currently provide for a maximum statutory notice requirement of eight weeks or less.

Further, many employment standards statutes include enhanced notice requirements for employers that effect a mass termination of employment, which is defined in most provinces and territories as the dismissal of 50 or more employees in a span of four weeks or less (although in several provinces the threshold is as low as 10 employees).

In Ontario and the federal jurisdiction, employment standards legislation also requires employers to provide employees with statutory severance payments (in addition to statutory notice

or pay in lieu of notice) in certain circumstances. In Ontario, employees who have five or more years of service at the time of their dismissal are entitled to statutory severance pay, if their employer has a payroll of C$2.5-million or more, or if the dismissal is part of a discontinuance of a business involving the termination of 50 or more employees in a period of six months or less. Severance pay is equal to one week's pay for each completed year of employment and a proportionate amount of one week's pay for a partial year of employment, to a maximum of 26 weeks' pay. In the federal jurisdiction, an employee is entitled to statutory severance pay if he or she has completed 12 consecutive months of employment with an employer before being dismissed. Statutory severance pay in the federal jurisdiction is calculated as the greater of two days' wages for each year of employment completed by the employee and five days' wages.

BONUS AND OTHER INCENTIVE AWARDS

Even after the appropriate length of notice has been determined, there are often still disputes over whether compensation for lost bonus or other incentive awards should be included. As mentioned above, when employees are provided with pay in lieu of notice, they are normally entitled to all elements of compensation that they would have received had they remained employed during the notice period, which may include bonus and other incentive awards. However, the terms of any underlying bonus or incentive plans or policies are relevant to the determination of whether compensation for such awards should be included as part of an employee's termination entitlements. For this reason, employers should ensure they have well-drafted plan documents.

CONCLUSION

Determining an employee's entitlements upon a without cause dismissal may not always be straightforward. It requires considering whether common law reasonable notice applies or whether a contractual provision (including those which may limit an employee to the statutory minimums) governs an employee's termination entitlements. If common law reasonable notice applies, the notice period must take into account various factors, including the availability of similar employment as well as the employee's age, length of service, position and level of compensation. On the other hand, a contractual termination provision must be checked to ensure it is enforceable and that it complies with applicable statutory minimum standards. Finally, it must be determined which elements of compensation will be owed during the notice period, including bonus or other incentive awards.

Investing in well-drafted employment contracts and plan documents at the outset, and ensuring they are regularly reviewed and updated, is a good way to avoid potential pitfalls and bring additional certainty and consistency to the termination process.

8. Employment Considerations in Business Transactions

OVERVIEW

It is essential to a successful transaction that a Buyer learn all it can about its Target. This includes an understanding of the employment and labour aspects of the Target's business. Such information is key not only to completing the due diligence process (for the purpose of identifying potential employment and labour-related liabilities), but, if the deal is consummated, to prepare for the integration of the Buyer and the Target.

PRELIMINARY CONSIDERATIONS

Share Deal vs. Asset Deal

One of the very first considerations for a Buyer is whether a proposed transaction will be structured as a share deal or an asset deal. Many factors may play a role in this decision, including tax and corporate considerations. As the names suggest, in a share deal, the Buyer is purchasing the shares of the Target, while in an asset deal, the Buyer is purchasing particular Target assets. From an employment and labour perspective, the distinction is critical.

In a completed share deal, for employment purposes, the Buyer steps into the shoes of the Target. The result is that the Buyer will automatically inherit all of the Target's employment-related liabilities, unless specific carve-outs are agreed to in the share purchase agreement. It also means that while new employment agreements will not be necessary to retain current employees (their employment will transfer automatically), the Buyer will inherit the terms of the existing employment contracts.

On the other hand, in an asset deal, a Buyer is better able to pick and choose — through negotiation with the Target — which assets it is prepared to purchase and which liabilities it will leave behind. Because employment of non-union employees will not transfer automatically (outside of Quebec), it will be necessary as part of the transaction to extend offers of employment to those non-union Target employees whose services the Buyer wishes to retain.

Scope of Due Diligence

A Buyer will also need to consider what employment-related material of the Target it wishes to review. The depth of due diligence a Buyer will wish to conduct varies, but in essence, a Buyer will want to identify any material employment-related liabilities.

General areas of interest typically include, but are not limited to: (1) an employee census; (2) collective bargaining agreements; (3) employment agreements; (4) independent contractor agreements; (5) severance, retention or change of control agreements; (6) employee compensation plans; (7) employment policies; (8) status of ongoing negotiations with unions and any recent labour organizing activity, strikes or lockouts; (9) any pending or anticipated claims or actions regarding employment and labour matters; and (10) information regarding workers' compensation and occupational health and safety.

RED FLAGS

A "red flag," as the term is used here, refers to an issue which may or may not ultimately harm a deal, but should be identified, flagged and its potential implications considered. Some typical red flags include:

Collective Bargaining Agreements

Whether a share deal or an asset deal, a Buyer will generally become bound by any collective bargaining agreement belonging to the Target pursuant to the successor employer provisions of labour relations legislation. This means the Buyer will inherit the underlying terms and conditions of such collective bargaining agreement. These terms and conditions may significantly restrict how the Buyer is able to run the Target's business post-closing. The substantive terms of the collective bargaining agreement, and when it expires, will therefore be of the utmost importance to a Buyer.

Misclassification Issues

Workers whom the Target has classified (and been treating as) independent contractors, may in fact be employees at law. Misclassification can give rise to potential employment and tax liabilities; and the greater the number of misclassified individuals, the more significant the liability.

Classification of workers as employees or independent contractors can be tricky and how the contract between the parties defines their relationship is not necessarily determinative. Therefore, a Buyer should not only review the independent contractor agreements themselves, but also investigate the day-to-day interactions between the parties.

Termination Provisions

Canadian employees can have significant entitlements to termination pay and in some instances severance pay as well, if their employment is terminated without cause. These entitlements arise both under employment standards legislation and the common law (or, in the case of Quebec, civil law).

It is therefore critical that a Buyer review any termination provisions carefully (or note the absence of them) in order to have a more accurate sense of what it may be required to pay out if it decides to terminate the employment of certain Target employees post-closing.

Change-of-Control Provisions

In some cases, an employee of the Target (typically an executive) will have negotiated a special entitlement — as a provision in his or her employment agreement or a standalone agreement — in the event of a "change of control," which is typically defined to include (1) the acquisition of control over the majority of the issued and outstanding voting shares of a business or (2) the sale, transfer or other disposition of all or substantially all of the assets of a business to a third party.

Depending on how the provision is structured, a transaction (and what occurs post-closing) may very well trigger a potentially substantial payout to that employee. With a "single trigger" change-of-control provision, the employee will typically receive a payout simply because a change of control occurred. With a "double trigger" change-of-control provision, the employee will typically receive a payment over and above what he or she would normally receive following a without-cause dismissal if such dismissal occurs within a defined period of time following a change of control.

If such liabilities exist, it is important to identify and quantify them so that they can be allocated or otherwise addressed during negotiations between Buyer and Target.

Restrictive Covenants

Employees are the heart of a business and often a significant part of the Target's value that a Buyer is paying for in a transaction. A Buyer will want to ensure that certain key employees will be bound by post-termination restrictive covenants (i.e., non-solicitation and/or non-competition covenants). These covenants, however, are often difficult to enforce. A Buyer will therefore want to know if such covenants exist and understand how likely they are to be enforceable.

Pending Litigation

Individual employment claims, particularly involving senior employees, may be a source of considerable liability, as are occupational health and safety prosecutions, which carry significant fines. Even lower-value claims — if there are enough of them — can add up significantly and be evidence of recurring non-compliance with the law. A Buyer will want to be aware of all pending and anticipated employment-related claims and/or grievances against the Target.

9. Employee Privacy

OVERVIEW

Rapid advances in technology have made it possible for employers to collect all kinds of information during the employment relationship. The information collected about an employee may be limited to the standard contents of his or her personnel file, but often also includes broader data, such as swipe card information and security footage. As a result, it is increasingly important to understand how the collection, use and disclosure of personal employee information is regulated under Canada's patchwork of privacy legislation and by the common law courts.

THE REGULATORY LANDSCAPE

Privacy legislation in Canada (as it relates to employee information) only extends to certain types of employers and within specific Canadian jurisdictions. The *Personal Information Protection and Electronic Documents Act* (PIPEDA) only applies to federally regulated employers in the context of collecting, using and disclosing personal employee information for employment purposes. Alberta, British Columbia, and Quebec have also passed comprehensive privacy legislation, applying to all provincially regulated employers in those provinces. The Alberta and British Columbia legislation is known in both provinces as the *Personal Information Protection Act* (PIPA), while Quebec's provincially regulated employers are subject to the *Act respecting the protection of personal information in the private sector*.

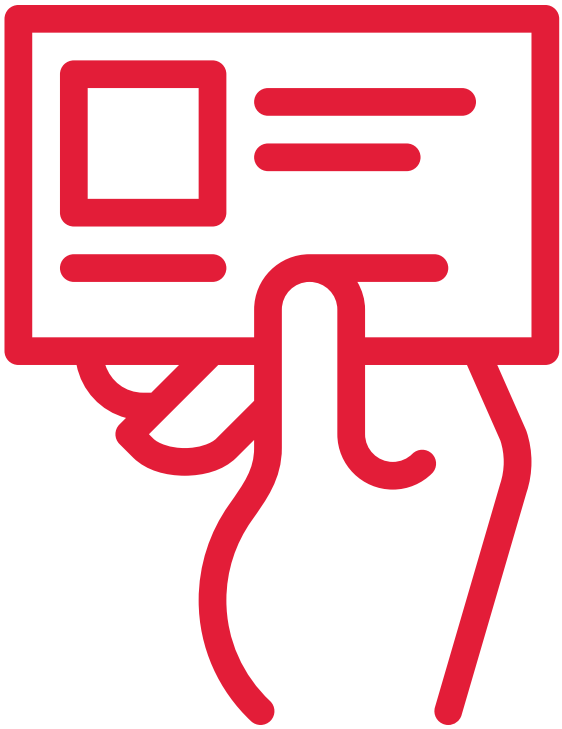
Certain other provinces have passed personal health information protection legislation, but do not have the same kind of comprehensive privacy statute. As a result, in those provinces, the collection, use and disclosure of personal employee information is governed primarily by the common law courts. For example, in 2012, the Supreme Court of Canada established that employees are entitled to "a reasonable expectation of privacy" in the workplace, and in that same year the Ontario Court of Appeal recognized an intrusion upon seclusion or invasion of privacy as a common law tort.

GETTING PERSONAL

Not all information is "personal information" under privacy statutes, but the term has been broadly defined to mean any information about an identifiable individual. Information may be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other information. However, an individual's "business contact information" is not personal information if it is collected, used or disclosed for the sole purpose of communications relating to that individual's employment.

GETTING CONSENT

Under the various privacy statutes, employers are generally required to seek employee consent — or at a minimum provide advance notification — for the collection, use and disclosure of personal employee information, with some limited exceptions. Recent amendments to PIPEDA allow federal businesses to collect, use or disclose personal information necessary to establish, manage or terminate an employment relationship without consent, provided that the individual has been informed that his or her personal information may be collected, used or disclosed for this purpose. In addition, information produced by an employee in the course of their employment, business or profession is also permitted to be collected, used or disclosed without consent so long as the collection is consistent with the purposes for which the information was produced.



ACCESS REQUESTS

Under the privacy statutes, employees have a right to request information about, and access to, any of their personal information collected by their employer. Access requests can only be refused in limited circumstances, such as where the information was generated in the course of a formal dispute resolution process, it would reveal confidential commercial information, or it is protected by solicitor-client privilege.

RETENTION AND DISPOSAL

Personal employee information should be retained only as long as necessary for the fulfilment of the purposes for which it was collected. Nevertheless, where personal information was used to make a decision about an individual, it should be retained for the legally required period of time thereafter (or other reasonable amount of time in the absence of legislative requirements) to allow the individual to access that information in order to understand, and possibly challenge, the basis for the decision. For example, employers may retain information about former employees for at least as long as the limitation period for wrongful dismissal claims.

BEST PRACTICES

The following best practices will assist employers in maintaining compliance with privacy legislation and avoiding tort claims:

- **Introduce or update your employee privacy policy.** A properly drafted policy will allow an employer to take the position that there has been implied consent or a notification to the employees with respect to collections, uses and disclosures of their personal information.
- **Introduce or update a retention policy.** Most provincial employment standards legislation provide prescribed time periods for the retention of certain employment information.
- **Update contracts with third-party providers.** Employers may be held responsible for the use or disclosure of personal employee information that is sent to third-party partners or vendors (e.g., payroll processors and benefits providers). It is worthwhile to ensure that third parties are bound (contractually or by other means) to protect the information received.
- **Introduce and regularly update physical and technological security measures** to prevent unauthorized access to employment information.
- **Provide regular privacy training and education to employees** to increase awareness of privacy risks and promote the use of security safeguards.

10. Terminating an Employee for Poor Performance

OVERVIEW

Under Canadian law, employers may unilaterally and immediately end an employment relationship without notice only if they have a valid reason — or "just cause" — for doing so. Absent just cause, employers must provide reasonable notice of termination, or pay in lieu of such notice, to end an employee's service. Canadian courts have set a high bar for establishing just cause due to the significant consequences to the employee. As such, an employee's conduct gives an employer just cause for dismissal without notice only in very limited circumstances, where the contract of employment is fundamentally breached.

A common issue for employers is whether they have just cause to dismiss a poorly performing employee. Certain forms of serious or wilful misconduct, including fraud, theft, harassment, and/or breach of fiduciary duty, often provide clear and immediate grounds to terminate an employee for cause. However, the situation is less clear when it comes to an employee who is incompetent or who simply does not perform his or her duties as required. Courts usually require employers to show that they took proactive steps in managing poorly performing employees before finding that a dismissal was for cause.

To reduce risk of liability for wrongful dismissal, before terminating for cause, employers should take proactive steps to manage poor performers and carefully consider whether the failure to meet performance standards give rises to just cause in the circumstances.

DISMISSAL FOR CAUSE – POOR PERFORMANCE

To justify dismissal for poor performance, employers must prove that the employee consistently fails to meet objective, reasonable performance standards that are known to the employee. An employer's subjective dissatisfaction with the employee's performance will not suffice. In assessing the reasonable performance standard, courts will also consider mitigating factors relating to the employee's circumstances or workplace. The employer must show that it is the employee's incompetence — not some other factor such as a downturn in the economy or the employer's failure to provide reasonable accommodation — that is causing the substandard performance.

The degree to which the employee's performance is substandard will impact the rights and obligations of the employer. In most cases, a pattern of substandard performance alone is not sufficient to justify dismissal for cause. Usually, prior warnings and an opportunity for improvement are required. Immediate dismissal without prior warning is justified only in very rare cases of extreme or "gross" incompetence, such as in situations where the employee's incompetence endangers the lives of others. But most often, where the degree of incompetence is less significant, the employer must (1) warn the employee that his or her job is at risk if performance does not improve within a specified period, (2) provide reasonable time and support for improvement, and (3) show that the employee's poor performance nonetheless persisted.

EMPLOYER'S DUTY TO ACCOMMODATE

When assessing an employee's performance, employers should consider whether any deficiencies are related to prohibited grounds of discrimination under applicable human rights legislation. If so, the employer has a duty to accommodate the employee up to the point of undue hardship. For example, age is a prohibited ground of discrimination which may be relevant to many employers, given rapid advances in technology and corresponding technical changes in the workplace. If performance issues are related to a prohibited ground of discrimination such as age or disability, the employer should first explore accommodation before considering termination.

BEST PRACTICES

The following best practices will assist employers in managing poorly performing employees and avoiding liability in wrongful dismissal claims:

- **Develop a clear policy and/or job description outlining performance standards.** The employee should be demonstrably aware of the required performance standard, such that he or she has reasonable opportunity to attain it. These performance standards should be reasonably attainable, having regard to the industry and nature of work.
- **Consistently apply performance standards.** Otherwise, courts may view the standard applied to any particular employee as arbitrary, rather than as necessary for performance of the employee's duties.
- **Be consistent in feedback given to employees.** If an employee's performance is consistently poor, make this clear to the employee. "Mixed signals" do not provide sufficient notice that an employee's performance is substandard. Similarly, failing to warn an employee of substandard performance may be interpreted by courts as condoning this level of performance, which can bar a later attempt to dismiss for cause.
- **Demonstrate that the employee cannot meet expectations.** In defending a wrongful dismissal claim, the employer must prove cause in court. Take time to carefully document an employee's poor performance to avoid unnecessary difficulties if litigation occurs.
- **Warn the employee of the risks associated with poor performance.** Ideally, such warnings should be in writing, both for evidentiary reasons and to ensure that the employee understands the consequences of failing to improve within a specified time period.
- **Provide a reasonable amount of time to comply.** The amount of time that is reasonable depends on the context. For example, a period of time that would ordinarily be reasonable may become unreasonable if the business is unusually busy or otherwise strained throughout.
- **Remember that patience helps reduce risk.** Courts are generally reluctant to accept an employer's claim of just cause for dismissal, particularly where the alleged cause is poor performance. Excluding exceptional circumstances, patience is the best approach to performance management. The longer period of time that the employer gives the employee to improve, the more likely that a court will find in the employer's favour.

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