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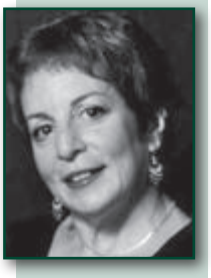
WINTER 2021 VOLUME 19, NO. 1



Nathaly Pinchuk
RPR, CMP
Executive Director

Perspective

Personal Training Plans: Plot Your Own Future

Career development doesn't happen on its own

You can sit around and wait for your employer to develop your training plan and send you on courses for your present job. That's an option and with today's challenges, you may be waiting a very long time. Most of us want more than that — to expand our horizons and reach higher. If you're of the same mind, why not consider creating your own personal training plan?

Start by assessing where you are today. Are your skills up to date for your current job and what your employer is asking of you? If not, chat with your manager and request some advice on training and support. You also should ask about the organization's plans and priorities for the future. That's really where your personal training plan should focus.

The objective of your plan should be to prepare you for where you want to go next with your current job, employer, career or somewhere else. Look at where you are now. How do your skills compare with your co-workers or peers in your field? Can you fully meet the needs that your employer or client base is asking of you? Once you feel comfortable with that and have a plan to address any shortcomings, you can then move to thinking about the future. Here you look at the knowledge or skills gaps required to reach your next level.

Your personal training plan should have some SMART goals. You know the drill. Once you establish your SMART goals, start working on your actual plan. For example, consider learning another language and moving into international sales. Look both inside and outside your organization for opportunities. You may already have internal resources available. Can you get a training opportunity in the international sales department? Will your employer let you shadow someone already doing this job or let you be part of the team that is designing next year's sales plan? Can you obtain access to documents relating to that particular position so that you can review them on your own time?

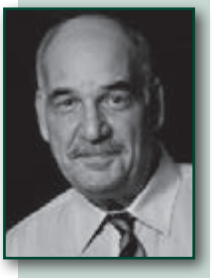
It's alright to ask your employer to provide you with insights and possibly help support your individual growth and training. Even in today's tough economy, the worst that can happen is that they refuse your request and tell you to do it on your own time and at your own expense. You've still demonstrated that you are eager to enhance your skills and grow within the organization. Perhaps they would help pay for a portion of your tuition or your learning materials. You'll never know unless you ask. Even if your employer cannot help pay for the program or materials, one basic element of any personal training plan should be that you are willing to devote the time and energy towards achieving your goals. You're worth it, no matter what else is going on in your life. If you don't look after your own needs, who will?

Investigate courses and both formal and informal professional development opportunities. Look at seminars or workshops offered and research online resources for the latest trends in international sales. Keep in mind that there is no cost associated with doing research and contacting others on your own time.

Make sure you have all the information required prior to making a final decision. Don't hesitate to contact others who are already working in the field both internally and externally. People love to talk about their work and most will be happy to share how they got there. Business networks such as LinkedIn provide you with an endless list of potential contacts and advisors. You could be one of them as well in the future.

Nathaly Pinchuk is Executive Director of IPM [Institute of Professional Management].

"You've been working hard for us, Freedwell, and you deserve some time off. Take an extra 10 minutes at lunch today."



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Procrastination: There's Always a Price to Pay

It's time to treat this condition

Benjamin Franklin was spot-on when he said "Don't put off until tomorrow what you can do today."

There are many reasons why we delay, defer or just ignore a task that's right in front of us. Unless you are seriously ill or have to do something else that is clearly more important or time-sensitive, you are probably procrastinating. Simple definition: putting off what you should do today in order to think about doing it tomorrow or the next day. Many senior executives feel that procrastination is one of the biggest problems throughout their entire organizations.

Why do we procrastinate? According to the collective brain that is the Internet, I found numerous possibilities. They range from anxiety to fear of failure, from feeling overwhelmed to perfectionism. There are also some great psychological theories that talk about demotivating factors that limit our self-control and hindering factors like mental exhaustion, but actually they are just excuses. These excuses or alibis allow us to postpone doing something that we will ultimately have to do anyway.

The answer that I was actually looking for is how do we deal with procrastination. Luckily the online hive mind had some insights on that issue as well. It seems the best way to avoid unwanted or unnecessary delays is to start by trying to figure out why you do it — exactly why you do it. Consider some recent cases where you put things off and why you did it, even though you knew that you shouldn't. You may be able to identify the source of your problem such as perfectionism or fear and deal with it more effectively than hiding your head in the sand and hoping it will disappear.

> "He who waits upon fortune is never sure of dinner."

Next, you make a plan on how to deal with future issues. That plan should include some goals and markers along the way to show your progress and your accomplishments, great and small. This will actually show you where you were successful. You will then be able to replicate this with more complex situations that you may have wanted to avoid.

Unfortunately, we may never get rid of all procrastination, but we can certainly diminish it. By the way, Benjamin Franklin also said "He who waits upon fortune is never sure of dinner."

Brian Pascal is President of IPM [Institute of Professional Management].

INSIDE THIS ISSUE

Ruben Goulart
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Feature

COVID Lessons for Employers

What a journey this has been!

While a solution to the COVID health crisis remains far from certain, there are some legal lessons that most employers can take away from the impact associated with the pandemic. This is especially important given the second wave, society getting back to the "new normal" (whatever that is), the opening of schools and a more serious shutdown (as frightening as that sounds). In other words, we could be living with this threat for a very long time, even after a vaccine is developed.

Ultimately, employers should be taking the time necessary to assess what worked well during the pandemic and what needs to be addressed or adjusted going forward to deal with our "new normal". Here are my key legal takeaways and lessons learned based upon what we have seen over the past number of months.

1. ***Adopt and maintain health and safety protocols that continue to mirror current COVID based standards, including the way work is scheduled and performed in order to maximize social distancing.*** The reality is that these health and safety standards make good sense both from a workplace culture and economic perspective. They also inspire the confidence of your workforce. In addition, thought should be given to improved sick leave arrangements. Employees who are sick often come to work because they cannot afford taking necessary time off. We have learned that employees who come to work in situations where they may be contagious could have a dramatic impact on the overall operation, especially if a quarantine becomes necessary. Therefore, enhanced sick leave arrangements are a great investment in the business.
2. ***Develop the flexibility you need to manage your workforce.*** First and foremost, adopt contracts and policies that provide for the express right to lay off your workforce and provide for temporary breaks from active service should the need arise. Without these provisions, employers still face the possible claim of constructive dismissal. I would suggest that the contractual provisions be extended to a broader group of employees beyond hourly staff which are traditionally the focus of temporary layoff provisions. If there is a concern in extending the provisions to management, then limit the ability to lay off to pandemics and events that are unforeseen.
3. Speaking of contractual provisions, ***develop language in your contracts that permits changes to duties and schedules*** generally, especially in times such as these. Most of the constructive dismissal claims we have seen during the shutdown were not based upon the layoff itself. They have been based upon changes employers have had to make to positions, duties and schedules given operating requirements which arose because of the pandemic and the effects the pandemic has had on reopening a number of businesses. By the way, it is not easy to amend agreements for existing employees. You will need to be mindful of the issue of "consideration" for the changes to be binding.
4. On the issue of recall from layoff, ***develop clear protocols that deal with the expectations on return once a recall notice is issued.*** Employees should understand clearly the ramifications of failing to respond to a recall notice within a specific time frame. Define those time frames in advance. Explain the consequences of failing to return without a justifiable reason. Many employers struggled with this issue as their companies began to open up — they simply could not get some employees back to work.
5. ***Challenge yourself to develop innovative and flexible remote work solutions.*** This involves building appropriate technology capability, as well as developing workplace policies that define key expectations for things such hours of work (overtime rules still apply), productivity and confidentiality. This also involves thinking through strategies to maintain workplace culture and fully engaging the workforce. Zoom can be your best friend — learn how to fully engage it.
6. ***Keep the lines of communication open with your employees.*** We are all in this together and having well-informed employees who are comfortable going to their employer with questions and concerns will increase employee confidence and productivity.

We are definitely not through this yet and there will be new challenges and issues to face going forward with a return to work, the complete opening up of the economy and our society.

continued on page 15...

Michelle Phaneuf
P.Eng., ACC
Partner, Workplace Fairness West

Ask the Expert

What will Organizational Leadership Post COVID need to look like?

Transform stressful situations into productive conflict

The COVID-19 pandemic has increased stress in our workplaces. This began through the initial disruption and had an immediate impact on our essential front-line workers and will continue as remote workers return to work and as we all manage a new normal. When stress increases, the opportunities for conflict multiply.

In any organization, stressful situations can intensify differences of opinions and magnify differing values that divide people. We look to our organizational leaders to successfully navigate issues in tough times, clarify values and unite people together to achieve innovative solutions.

Mark Gerzon, author of *'Leading Through Conflict: How Successful Leaders Transform Differences into Opportunities'*, identifies eight tools that every organization needs to develop to take that journey through difficult situations and shift the unproductive conflict that can spiral in stressful situations into productive conflict. These tools will support organizational leadership to foster an environment where innovation can flourish.

1. Integral Vision

Before we charge ahead, let's take an opportunity to step back and look at the situation from a different perspective. What will it take to help others turn away from the 'you' against 'me' dynamic that can be fostered in conflict situations and stand together as 'us against the problem'?

2. Systems Thinking

This reflects an organizational model that recognizes that people, structures and processes interact within organizational systems to foster (or restrict) organizational (and individual) wellbeing. What stakeholders should we approach to understand the whole problem and identify the multiple elements creating the conflict situation and the relationship between these elements?

3. Presence

This is the ability to be fully in the moment, engaging all our resources and not just relying on our thinking brains, but our whole selves, emotionally, spiritually and physically. What are we noticing in the conversation? What are we feeling? What is behind what others are displaying in their behaviours? Awareness is a fundamental skill when managing conflict in ourselves and others.

4. Inquiry

Asking questions is the key. It's difficult to be curious when we are in the heart of conflict. How can we transform the conflict if we do not understand it? Asking the right questions helps others understand their role in the conflict. Can we dig down to the heart of the problem and keep asking and then what? What do you need to do to be open to really listening to what you hear?

5. Conscious Conversation

We all have a choice in how we speak and listen. Participants in difficult conversations are often reacting mindlessly in an ongoing loop of attacks and counterattacks. Organizations need to support others to have a different type of conversation, shifting away from positions to discussing values and interests.

Taking time to ensure we build understanding before focusing on solutions is important.

6. Dialogue

Building trust is the first step in resolving conflict and dialogue is the path to get there. Genuine dialogue occurs when participants move away from defensiveness and become open to really hearing the other side. It lays the foundation to discover new options and gives rise to innovation.

7. Bridging

Bridging is the process of building partnerships and alliances that cross the division in an organization. The bridge is constructed by trust, respect, empathy, understanding and collaboration. When the energy between the parties changes, the conflict can be transformed. This shift takes time to create and is generated by focusing conversations on values and interests to build understanding — not agreement. Let's focus on finding solutions to the issues that meet all parties' needs.

8. Innovation

Innovation is the breakthrough that creates new options for moving through conflicts. Those options will point to a new plan that requires the buy-in of all involved. If this does not occur, the plan will not be sustainable in the long term. We may need to go back to the drawing board to ensure we meet the needs of all participants.

Being an organizational leader when stress is high and conflict is elevated takes time and patience. It is an iterative process with ups and downs. It entails reaching into the past

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Tom Ross
Q.C.
Partner, McLennan Ross LLP

Alberta Introduces New Labour and Employment Legislation

Positive changes finally give a lift to employers

Last year, Alberta's new Government introduced a number of positive changes to the *Labour Relations Code* and *Employment Standards Code*. It was part of an effort to undo changes by the previous government, reduce regulatory burden and expense, and make it easier to do business in Alberta at a time it was needed.

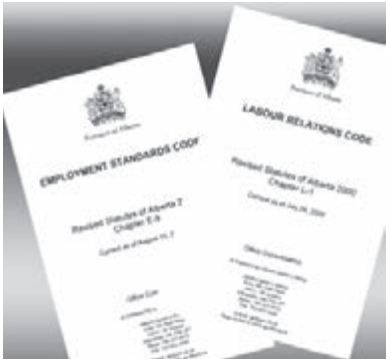
The Government announced there would be further changes. Now, as the focus turns to re-igniting the economy post-COVID, the additional changes we have been waiting for were introduced in July as Bill 32, *Restoring Balance in Alberta's Workplaces Act*, 2020. These positive changes are again intended to improve the *Labour Relations Code* and *Employment Standards Code*, reduce regulatory burden and give a lift to employers as they generate employment in the wake of COVID-19. On July 29, Bill 32 was passed and became law.

Here are some of the changes to the *Employment Standards Code* ("*ESC*"):

Averaging Arrangements

1. A significant modification to the *ESC* is the change of averaging agreements within the existing *ESC* to "averaging arrangements," with different and more flexible obligations. Averaging arrangements will be similar to the "compressed work weeks" that applied before the concept of averaging agreements was introduced in the 2017–18 *ESC* changes.

Employee agreement is no longer required to place employees on an averaging arrangement, though the arrangement must still be in writing. An employer can



require work under an averaging arrangement prior to employment or on 2 weeks' notice. The arrangement must also specify the work schedule with daily and weekly hours. However, it will be much easier to make changes to schedules under an averaging arrangement. Employers simply must specify the manner of amending the schedule and give notice when required. The averaging arrangement can also specify the overtime entitlements. The new averaging period for averaging arrangements will be 52 weeks instead of 12 weeks.

There will also be a 6-month right of complaint for non-compliance with the averaging arrangement.

Averaging arrangements will also be addressed in the regulations.

Holiday Pay

2. The definition of "average daily wage," used for calculating holiday pay, has been removed. It will now be calculated by averaging the employee's total wages in one of two 4-week periods the employer chooses over the number of days worked:

a. immediately preceding the holiday; or

b. ending on the last day of the pay period immediately preceding the holiday.

Payment of Earnings upon Termination

3. When an employee's employment ends, the employer will have more time to pay the employee's earnings. The existing time limits (3 or 10 days after employment ends) caused logistics issues in managing normal payroll and payments. Under the new legislation, the employer must pay the employee's earnings within one of the following periods:

a. 10 consecutive days after the end of the pay period in which the termination of employment occurs; or

b. 31 consecutive days after the last day of employment.

Deductions from Earnings

4. Consistent with Employment Standards practice in Alberta, but not previously included in the *ESC*, the new legislation will allow employers to deduct the following from earnings, upon providing notice:

a. a recovery of an overpayment of earnings paid to the employee resulting from a payroll calculation error, and

b. a recovery of vacation pay paid to the employee in advance of the employee being entitled to it, up to 6 months after the overpayment was paid to the employee.

Hours of Work and Rest Periods

5. The hours of work maximum (usually confined to 12 hours), shift change

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Feature

Feature

Alberta Labour & Employment Legislation

... concluded from page 6

requirements and days of rest may now be overridden by a collective agreement.

Rest periods were slightly modified. For shifts between 5 and 10 hours (instead of 5 hours or more), at least one 30-minute rest period is required. For shifts more than 10 hours, two rest periods are required of at least 30 minutes. Rest periods of 30 minutes can be paid or unpaid and broken into two 15-minute breaks. The amendments also allow employers to define when breaks will be taken if there is no agreement.

Variances

6. Changes have been made to streamline the variance provisions and make them more accessible.

Layoffs

7. The maximum period before layoffs become permanent is extended from 60 to 90 days within a 120-day period.

Layoffs related to COVID-19 remain at 180 consecutive days of layoff.

The termination requirements after layoff can be overridden by a collective agreement.

Group Terminations

8. The group termination provisions will return to what they were before 2018: 4 weeks of notice, to the Minister of Labour only, when 50 or more employees are terminated at a single location with a 4-week period.

This notice is not required in respect to employees who are employed on a seasonal basis or for a definite term or task, or when excepted by regulation.

The group termination requirement has been removed from the individual termination notice or pay in lieu of notice requirements.

Coming into Force

9. Some parts of the new legislation came into effect on August 15, 2020, with others effective November 1, 2020.

Tom Ross is a partner with McLennan Ross LLP in Calgary and can be reached via email at tross@mross.com.

Reducing Wage Rate: Don't Recycle the Notice

Always provide notice in writing

Duncan Marsden
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Feature

One of the more unique statutory requirements under Alberta's *Employment Standards Code* (the "*Code*") as compared to other provinces is section 13 of the *Code*, which requires that employers must give each employee notice of a reduction of the employee's wage rate, overtime rate, vacation pay, general holiday pay or termination pay before the start of the employee's pay period in which the reduction is to take effect. Otherwise, the employee is entitled to the difference between the employee's wage rate, overtime rate, vacation pay, general holiday pay or termination pay before the reduction and those rates and pay after the reduction from the time in the pay period in which the reduction was first applied to the end of that pay period.

The Alberta Labour Relations Board (the "Board") recently explored this provision in *I.T. Partners Inc. and Moore, Re*, [2020] A.W.L.D. 1064. In this decision, the Employment Standards officer found that proper notice was not provided, so the employee was owed the difference between the employee's wage rate until the end of the pay period.

The employee in this decision was hired on July 17, 2017 with an hourly rate of $40.87. However, the employer found that the employee did not demonstrate the appropriate skill set for his position of Systems Analyst Tier III. The employer advised him in a letter dated December 15, 2017 that his service as a Systems Analyst Tier III was terminated, but the employee would be offered immediate employment as a Systems Analyst Tier II, and the employer would be committed to providing him training to develop him to perform at a Tier III level. The employee was required to sign a new employment agreement if he accepts. In early January 2018, the employee signed a new employment agreement with an hourly rate of $31.25.

> ... employers should consider the length of pay period it uses for the employment relationship and the effect it may have in terms of notice if entitlements may be reduced.

This employer's pay period was a monthly pay period from the 26th of one month to the 25th of the next, and the specific period in question was from December 26, 2017 to January 25, 2018. The pay stub during this period showed that 111.5 hours worked were paid at a reduced wage rate of $31.25.

The employer gave evidence that at the December 15, 2017 termination meeting, notice of the wage reduction was given verbally that the compensation of the new role would be $65,000 per year (which equates to $31.25 per hour assuming 40 hour work weeks), that the employee accepted the offer, and that it maintained the non-reduced wage rate for 30 days after December 15 by showing that 64 hours in the December 26, 2017 to January 25, 2018 pay period were paid at the non-reduced wage rate. However, the employee stated that he did not learn of his new wage rate until the receipt of his new employment agreement on January 8.

The Board found that although the Employer may have told the employee something about an impending change to his role and wages and that the paystub showed that the wage rate did not change for 30 days, this did not matter unless notice of the ***specific new wage rate*** was given at the meeting. In reviewing the December 15, 2017 letter, the Board questioned whether the employer provided notice of the specific new wage rate to the employee verbally, based on the fact that the letter states: "You will be required to execute a new employment agreement that will outline your corresponding remuneration for the position". Although the employer argued that the "corresponding remuneration" referred to in the letter was the $65,000 per year remuneration that was discussed verbally, the Board found that the suggestion that the "corresponding remuneration" language refers to a rate which has already been provided verbally was "not an easy fit". Ultimately, because it was not clear that the employer provided notice of the specific wage rate reduction prior to the pay period where the wage rate was reduced, the Employment Standards officer's order was upheld.

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Feature

Reducing Wage Rate

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Key Takeaways

Aside from the statutory requirement that employers must provide notice of the wage rate reduction (and overtime rate, vacation pay, general holiday pay or termination pay reductions) prior to the pay period when the reduction will take place, there are other key takeaways for employers. First, employers can decide on the length of each pay period. Under section 7 of the *Code*, every employer must establish one or more pay periods for the calculation of wages and overtime pay due to an employee, but a pay period must not be longer than one work month. As a result, employers should consider the length of pay period it uses for the employment relationship and the effect it may have in terms of notice if entitlements may be reduced. Second, employers should consider providing written notice of reductions. Although the Board confirmed that notices of reduction do not have to be in writing, the Board also warned that employers rely upon verbal notice at its potential peril, as it makes proof that notice was given more difficult, as evidenced in the above decision. As a result, although not required, notice of wage reduction should be provided in writing and retained in accordance with the *Code*'s record retention requirements.

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Feature

Ontario Court of Appeal Finds Illegal Termination Clause Not Saved by Enforceable Termination Clause

Taking the good with the bad

Termination clauses are a hot topic in employment law and the enforceability thereof is seemingly ever-changing. A recent decision of the Ontario Court of Appeal is no exception. The Ontario Court of Appeal in *Waksdale v Swegon North America Inc.*, 2020 ONCA 391 (CanLII) found that termination clauses, no matter how separate or whether they deal with different circumstances (termination without cause and termination for cause), must be considered as a whole when determining enforceability and an unenforceable termination clause renders the entire employment contract void, regardless of the legality of any other termination clause.

A former employee brought an action for damages for wrongful dismissal against his former employer. The employment relationship was governed by an employment contract which contained separate clauses for termination of employment without cause and for cause. The employer terminated the employee's employment on a without cause basis in accordance with the clause in the contract which provided greater notice of termination than the minimum provided in the *Employment Standards Act*, 2000.

The contract also contained a separate termination for cause provision, which both parties conceded violated the *Employment Standards Act*, 2000. Both the employee and the employer brought motions for summary judgement. At the summary judgment motion, the employee argued that the termination for cause provision violated the *Employment Standards Act*, 2000 and was unenforceable, rendering the entire contract void. The employer argued that the termination for cause provision was irrelevant as the termination was without cause and furthermore, the contract contained a severability clause making any illegal provisions, such as the termination for cause provision, severable from the remaining terms of the contract.

The motions' judge found that the termination without cause provision was unambiguous, enforceable and stood alone from the termination for cause provision which didn't apply. The motions' judge found that the employer acted within its rights under the agreement and the employee had been provided with notice of termination in accordance with the contract, and dismissed the employee's claim.

The employee appealed the decision of the motions' judge to the Ontario Court of Appeal. The Court of Appeal noted that the narrow issue to be decided by the motions' judge was whether the illegality of the termination for cause provision (which was not relied on) rendered the termination without cause provision unenforceable.

The Court of Appeal reviewed the law regarding the interpretation of termination clauses, centring on the principles that courts should favour an interpretation that encourages compliance with the *Employment Standards Act*, 2000 and protects employees as much as possible; and that termination clauses should be

continued next page...

Enforceable Termination Clause

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interpreted in a way that encourages employer compliance with the *Employment Standards Act*, 2000 to incentivise employers to draft lawful termination provisions. The Court of Appeal opined that the wording of the contract alone must be considered in deciding whether it complies with the *Employment Standards Act*, 2000, not whether the employer might have relied on that provision therefore, the employer's compliance with the otherwise enforceable termination without cause provision, does not save the termination for cause provision which violates the *Employment Standards Act*, 2000.

The Court of Appeal determined that employment contracts must be interpreted as a whole, including the termination provisions. Employers have the right to restrict an employee's right to common law reasonable notice in an employment contract but, courts will not enforce termination provisions that are in whole or in part illegal and the motions' judge erred by treating the termination provisions as separate, rather than reading them as a whole and considering their combined effect. The fact that the employer did not rely on the termination for cause provision makes no difference because the Court of Appeal found that a determination regarding enforceability of the termination provisions as a whole is made at the time the agreement was executed.

> The employment relationship was governed by an employment contract which contained separate clauses for termination of employment without cause and for cause.

Lastly, with respect to the severability clause, the Court of Appeal declined to apply the clause, opining that a severability cause cannot have that effect on clauses of a contract that are void by statute. Ultimately, the Court of Appeal concluded that the motions' judge erred in law in interpreting the employment contract and allowed the appeal, remitting the matter back to the motions' judge to determine the quantum of damages.

In light of this decision and the rather significant change in the law with respect to how employment contracts and termination clauses in particular are interpreted, employers should be very careful to ensure that termination clauses are enforceable so as not to negate the enforceability of the contract as a whole.

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Presenteeism May Be Costing Your Organization More Than Absenteeism

How employers should deal with it

Organizations who are looking closely at issues of Presenteeism (not just at absenteeism) in the workplace will be well served in building resilient and responsive cultures.

You may be wondering what presenteeism is, how do you know it's an issue for your organization and what to do about it if presenteeism is a concern.

Presenteeism is commonly defined as employees who come to work despite having a sickness or issue that justifies an absence. As the result of them coming to work, their performance is less than optimal and potentially creates a series of other concerns such as reduced capacity to handle stress or crisis, decline in productivity, mistakes they would not normally make and communication breakdowns to name a few. It occurs when an individual's ongoing physical or mental/emotional conditions prevent employees from being fully present and productive at work. Examples of this include ailments that can affect your employees such as mental health issues, dealing with grief, asthma, chronic pain, arthritis, migraines, allergies, depression, diabetes and anxiety — the list of conditions is long and varied. Your organization and employees could be more affected than you realize.

When employees come to work not fully and mentally present due to sickness, extreme stress, family crisis or after a significant loss, they are not allowing themselves the time they need to get better, heal or deal with the situation at hand. There is much research connecting stressful life events to a variety of health issues to absenteeism and presenteeism. Employees who have had a major health issue such as surgery or medical treatment for chronic illness are more likely to take time off such as sick days or access health benefits. This is an example of absenteeism and a good reason to take time off work.

Many organizations are struggling with how to address this issue. Building team charters, providing training, scheduling informational in-services and improving the workplace culture go a long way in addressing the issue of employee engagement and supporting employees when they need help the most.

Employees who have sought psychological help, counselling or other supports for mental health related issues are more likely to present with presenteeism and not as likely to take time off work. We see this more commonly in employees who have aging parents (where the employee is actively involved with their care), employees who are parents, lower waged employees, employees where there is uncertainty in their employment status (e.g. still on probation, temporary or seasonal employees) and individuals who struggle in setting boundaries in times of stress or in demanding situations.

There are a number of reasons that employees don't take time off when they should, including financial, no backup plan or anyone to assist with workload in their absence, fear of returning and being overwhelmed with additional work, commitments (e.g. to meetings, projects, events, deadlines), concerns about job security and concerns about how they will be perceived by others

Organizations tend to track, monitor and measure absenteeism because there are systems and processes in place to more easily do this. However, presenteeism is not typically measured or monitored because it is less tangible and often the employer is not aware that this is an issue. Many employers make assumptions that if sickness rates are low in the organization, then their employees must be healthy and well. Research tells us that the costs of presenteeism could in fact be greater than those of absenteeism. Sometimes the workplace culture has embedded in it an undertone of "come to work regardless..." Employees then feel guilt or fear if they were to take time off. We see this a lot after community crisis situations such as following a disaster. Employees feel that their situation may not be as severe as others so they come to work.

What can organizations do to effectively identify and deal with presenteeism? Here are examples of what some organizations have effectively implemented:

- Create a culture where employee health, wellness and mental health is valued, talked about and modelled. A culture where it is safe to approach your supervisor to request a couple of days off or a shift change to allow time to deal with a family issue that is impacting their ability to work productively, safely and efficiently. Create a culture of care.

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Feature

Paula Morand
CSP

Keynote Speaker, Leadership Expert

Use the CAR Strategy to drive your leadership

A business growth model that delivers results

If you want to lead your organization to growth, you can get there by CAR.

The CAR strategy is a business growth model my team and I developed to help the entrepreneurs and organizational leaders we mentor.

CAR stands for **C**onsistency, **A**lignment and **R**epetition.

You need to be consistent in the delivery of your quality, you need to align your goals with your customer's goals and you need to repeat certain processes that work well over and over again until you perfect them.

Managing the phases of growth means moving forward, but with time to analyze the steps you take and judge what is working and what is not. It is better to keep a close eye on each stage of your growth process so you can make a quick tweak if something isn't working, rather than to go full speed ahead and discover you're heading down the wrong road. In most cases, you need about six months to work out the bugs.

Projects often fail not because the idea is flawed, but because we don't take the time to adhere to the new process consistently for a sufficient time to really know if it works or not. Implementing a new idea or process every day or every week or even every month may sound exciting on paper, but in the reality of even the fastest-paced business, it is unrealistic.

Consistency also involves setting up processes to gauge whether projects are being delivered in a timely fashion and goals are reached. Leaders need to set an example and, in most instances, that means holding recurring and consistent

meetings to keep all parties involved on the progress of a project, and making time for team leaders to consult when needed.

Regardless of how consistent you are as a leader, your project will not take off if your mission as a leader is not aligned with the mission of your team members. One of you will have to change. Since you are the leader, you will have to find ways to persuade and inspire them to see it your way. This is the toughest part of getting anything done in life.

There is only one way you can really count on alignment in your business and that is right from the beginning to establish a culture of shared purpose. You can do this by making sure that each employee understands why they are being asked to participate in an initiative, the benefits such a project will provide for the company and ultimately for them.

Once you have processes in place to measure and support consistency and your team is aligned with your purpose to lead seamlessly from one project to another, you need to introduce repetition if you want your team to become increasingly more skilled and professional.

The more we do things, the better we get at them. We become more familiar with the likely problems we will encounter and the effective solutions to those problems. Then we learn how to avoid those problems all together. All of this comes through repetition.

We are all familiar with Malcolm Gladwell's concept that we need 10,000 hours of practice to become really skilled at anything in life- there is a lot of wisdom to that idea. If you want your team to become the best at anything, you have to ensure that they have hours and hours of practice.

This concept also works for leaders. You become what you do repeatedly. If you repeatedly lead by ensuring consistency and alignment with your goals, you will become more adept at overcoming challenges and staying on course to reach your goals.

Repetition also applies to your values and objectives as a leader. If you are consistent in what is important (as in client service, for example), then your team members will know that if they have to make a decision that supports client service, they will be performing according to the best practices that you insist on.

Repetition is not boring because it does not mean merely doing one thing over and over again. Instead it means honing your skills, getting faster, more creative and more innovative because you familiarize yourself with an issue or item repeatedly. Repetition works for your team as producers and for you as a leader to enhance the skillset both of you need to do your best, most authentic work.

Paula Morand is a keynote speaker, author and leadership expert who helps high potential visionaries and organizations take their brand and their business to the next level. She can be reached via email at bookings@paulamorand.com.

Genetic Discrimination – A New Frontier

Failure to comply brings heavy penalties

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Feature

On July 10, 2020, in a 5-4 split judgement, the Supreme Court of Canada released its decision upholding the *Genetic Non-Discrimination Act* ("*GNDA*" or the "*Act*"). The majority ruled the *Act* as valid criminal law enacted by Parliament.

This ruling has wide implications for employers, insurance companies and other various other industries as it establishes severe penalties if convicted of using information from genetic tests in concluding contracts.

Background to the GNDA

In 2015, Bill S-201, an Act to prohibit and prevent genetic discrimination, was introduced. Before that Bill was passed in May 2017, nothing protected Canadians from a third party, such as an employer, demanding access to their genetic testing and subsequently using that information against them.

The Purpose of the GNDA

The *GNDA*'s purpose is to combat a new form of discrimination. Genetic discrimination refers to the differential treatment that an individual would face based on their decision to undergo or forego genetic testing. A "genetic test" is defined in the *Act* as an analysis of DNA, RNA or chromosomes for the purpose of prediction, monitoring, diagnosis or prognosis of a disease.

The *Act* criminalizes compulsory genetic testing, compulsory disclosure and non-consensual use of test results. The prohibitions apply to a broad range of circumstances in which individuals might be treated adversely because of their decision to undergo genetic testing.

Notably, the Supreme Court of Canada emphasized that the most significant effect of the *Act* is that it gives control back to individuals who will now be able to make choices related to genetic testing without repercussions on their personal or professional lives.

Direct Impact on Federally-Regulated Employers

This *GNDA* has a particular impact on federally-regulated employers, as it also amends the *Canada Labour Code* and the *Canadian Human Rights Act* to incorporate new prohibitions. These amendments include:

Canada Labour Code – two new sections: ss. 247.98 and 247.99

- An employee is not required to undergo genetic testing, or to disclose genetic testing results to their employer;
- Employers are prohibited from engaging in retaliatory measures (such as dismissing, suspending, or imposing a penalty) due to an employee's refusal to undergo genetic testing or to disclose testing results; and
- Employers are not allowed to access the results of an employee's genetic tests without an employee's written consent.

Employees are also able to make a complaint where it is alleged that an employer has violated these provisions. If the employer is found to have infringed on the rights recognized by this legislation, the employer may be subject to corrective action, which could be monetary or otherwise.

Canadian Human Rights Act — new prohibited ground of discrimination

Interestingly, Bill S-201 initially included a definition for "genetic discrimination," but it was dropped because the Canadian Human Rights Commission felt that the definition would limit its interpretation and evolution. As such, while this new ground of discrimination has been added to the *Canadian Human Rights Act*, its interpretation will be left entirely to the Canadian Human Rights Tribunal and Canadian Courts to determine.

Takeaways for Employers

While the impact of the above-referenced amendments will only directly apply to federally-regulated undertakings, it is important for all employers to be aware of them. The prohibitions set forth in the *GNDA* itself also creates criminal offences for genetic discrimination which may be applied universally. The penalties associated with these offences are a fine of up to $1 million or imprisonment for up to 5 years or both, demonstrating the significance of the matter.

It is also important to note that the effect of the Supreme Court's decision to uphold the *Act* renders any provincial legislation that allowed the compulsory disclosure of health information no longer operable, so as to require individuals to disclose genetic test results. As such, provincially-regulated employers may well see changes to provincial legislation coming in the near future to adapt to this new issue.

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COVID Lessons for Employers

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Employers who learn from experience, fully explore their options and plan for future possibilities will be in the best position to adapt and succeed.

Ruben Goulart is the founder of the new firm Goulart Workplace Lawyers, itself formed during the pandemic, based in Oakville, Ontario. Ruben can be reached via email at rgoulart@goulartlawyers.ca.

Leadership Post COVID

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when required, staying in the present for open dialogue and focusing on the future once participants have shifted. Good leaders build the skills required to transform conflict and support those around them to get to the other side. We might not know yet what the 'other side' is after this pandemic, but trust that strong organizational leadership will generate the innovative outcomes needed to adapt and thrive.

Michelle Phaneuf is Partner at Workplace Fairness West and can be reached via email at phaneuf@workplacefairnesswest.ca.

Presenteeism

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- Work from home day.
- Monthly "just because" or mental health or wellness day or a bank of flex days per year. Many organizations handle this similar to their sick time.
- Support employees through training in skill sets that can help them cope such as work life harmony or stress management training, communication and conflict resolution skills training, time management and productivity support.
- Train managers and supervisors to be alert to employees at work who are unwell and how to respond.
- Ensure your policies support a culture of wellness.
- Senior executives should encourage a positive culture that encourages good attendance when people are well but supports employees in taking necessary time off which also includes return to work practices.

Some organizations are engaging employees in their presenteeism strategy planning- what a great approach to engaging employees in a way that benefits the organization and culture.

Charmaine Hammond, CSP is a business keynote and workshop speaker, entrepreneur, author and educator who teaches and advocates the importance of developing trust, healthy relationships and collaboration in the workplace. She is President of Hammond International Inc. and can be reached via email at charmaine@hammondgroup.biz.

Genetic Discrimination

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Generally, while employers are not strictly prohibited from asking employees if they have undergone genetic testing, they cannot under any circumstance require them or pressure them into undergoing tests or disclosing genetic test results. They also cannot access results without their employee's written consent. To do so would be an offence under the *GNDA*, regardless of whether the employer is federal or provincial.

All employers are also encouraged to consider how these changes could apply to their business and whether communication to employees or changes to business practices is required. If employees conduct themselves on behalf of an entity in a manner prohibited by the *GNDA*, the employer may be exposed to vicarious liability. For example, because of the *GNDA*, an employee cannot conclude contracts on behalf of the employer if a genetic test was a condition to the contract as this might trigger criminal offences under the *Act*, even though commercial contracts generally fall under provincial jurisdiction. The refusal of service based on genetic test results would also be prohibited.

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