**Absenteeism**

The Do's & Don'ts of Asking Employees for a Doctor’s Note

This story will help you
Get doctor’s notes from sick employees without violating privacy or discrimination laws

It seems like such a simple thing. But thanks to privacy and disability discrimination laws, asking employees for a doctor’s note when they call in sick has become a liability issue of significant dimensions. At least that’s the perception of some HR directors. In fact, as long as you understand where the lines are drawn, the rules are straightforward and fairly easy to comply with. Here are the do’s and don’ts of employee doctor’s notes.

**THE LAW OF DR.’s NOTES**

Asking employees for doctor’s notes raises a pair of legal issues. First, the medical information the doctor provides may be considered personal information protected by privacy laws. The

**DRESS CODES**

How Far Can You Go?

Can we establish a dress code? How far is too far? And should we even care about what our employees wear?

These questions were submitted by an Insider member. And since the limits of the employer’s right to limit what its employees wear is perennially among the most frequently litigated employment issues, we decided to answer it by: a. dedicating an article to explaining the ground rules of dress codes; and b. posing a series of scenarios from actual court cases to show you how to apply them at your own workplace.
other legal concern is that the note may reveal that the employee has an illness or injury that constitutes a disability under human rights laws. That’s a problem because it’s against the law to discipline an employee for having a disability.

By the same token, employers generally ask for doctor’s notes not to pry but because they need the information to carry out significant, non-discriminatory employment functions, e.g., confirming that employees who call in sick qualify for sick pay and/or are following the organization’s attendance management program.

The rules governing requests for doctor’s notes are an attempt to balance these competing employer and employee interests. The rule: Employers are allowed to ask employees for a doctor’s note on 3 conditions:

1. They need the information to perform a legitimate and necessary employment-related function;
2. They ask for only the information they need to accomplish that function; and
3. They keep the medical information they collect from the doctor confidential.

1. WHEN YOU CAN & CAN’T ASK FOR A DOCTOR’S NOTE

Generally, you can ask for a doctor’s note to:
- Enforce your organization’s attendance management requirements and ensure that employees have a legitimate medical reason for being absent;
- Confirm that an employee who calls in sick is entitled to sick pay;
- Determine if employees are entitled to disability benefits, workers’ comp and other illness/injury-related benefits;
- Determine if employees are entitled to disability, medical or other leaves of absence under employment standards laws and/or their contract or collective agreement;
- Verify that employees requesting accommodations for a medical condition really have such a condition;
- Determine the capabilities of injured/ill employees who request accommodations and/or as part of the return-to-work process; and
- Confirm that employees are following the terms of the rehab, anger management or other employment-related treatment plans they’re required to complete.

You’re not allowed to ask employees for a doctor’s note when you don’t need the information to perform a legitimate employment-related task. Examples including asking for a doctor’s note:
- Every time an employee calls in sick as a matter of principle;
- To harass or dig up dirt on the employee; and

[HR Compliance Insider continues on page 3]
To find out about suspected illnesses or injuries that have no impact on their job duties, e.g., whether an office receptionist at a church has HIV.

2. INFORMATION YOU CAN & CAN’T REQUEST

You must ask the doctor for only the medical information you need to carry out the employment task for which you’re requesting the information.

When your sole purpose is to ensure that employees who call in sick for a day or 2 aren’t taking advantage, all you need from the doctor is confirmation that the employee has a short-term illness requiring her to stay home. In determining employees’ eligibility for benefits, leave and accommodations, you may need not just confirmation but details about the employee’s condition. Just be sure to limit your request to only the details relevant to the purpose you’re trying to accomplish. Example: If an employee is returning to work from a sprained wrist, asking about his psychiatric health is out of bounds. Other ground rules:

3. KEEPING THE INFORMATION CONFIDENTIAL

The final requirement is that you keep the medical information you obtain about employees from their doctors confidential and secure. Security measures may include use of:

- Physical barriers such as keeping doctors’ notes in locked files;
- Electronic measures such as password protection and encryption of the information; and
- Administrative controls such as limiting staffers with access to the information the minimum on a strictly need-to-know basis.

You also have to make sure you properly destroy the doctor’s notes you collect when you no longer need them.

Conclusion

In sum, you should be okay if you follow these 3 rules:

1. While you shouldn’t do it automatically or as “a matter of principle,” don’t be afraid to ask employees for a doctor’s note when you need the information to carry out an important HR function;

2. Ask for only the information you need to perform that function; and

3. Recognize that doctor’s notes contain private medical information about employees that must be kept secure and confidential.

You can use the Model Employee Medical Absence Documentation Form on page 4 below to keep requests for medical information from employees’ doctors within these parameters.
DO'S AND DON'TS OF ASKING FOR A DOCTOR’S NOTE  CONTINUED FROM PAGE 3

MODEL MEDICAL ABSENCE FORM

You’re generally allowed to ask employees for a doctor’s note confirming that they were sick. But legal limits apply. Having employees give their doctors a Model Absence Form like this to fill out can help you ensure that you limit your request to medical information that won’t get you into trouble under privacy or disability discrimination laws. As ever, make sure you adapt the Model to your particular circumstances.

MODEL EMPLOYEE MEDICAL ABSENCE DOCUMENTATION FORM

INSTRUCTIONS FOR EMPLOYEES: Give this Form to your doctor to complete when ABC Company asks you for a doctor’s note confirming the medical reasons for your absence.

INSTRUCTIONS FOR DOCTORS: The purpose of this Form is to provide the patient/ABC Company employee the necessary information he/she needs to give to ABC Company’s HR Department to confirm that an absence from work was taken for valid medical reasons. This Form is not intended for workers’ compensation purposes. Please keep a copy of the Form in your files after you complete it.

In completing this Form, please disclose only the information necessary to meet the Form’s purpose. Typically, it’s not necessary to provide a diagnosis or treatment information.

Doctor’s Name: ____________________________

Address: ________________________________________________________________

I saw [patient’s name] ____________________________ on [date] __________________

I am satisfied that, for medical reasons, this patient did not/will not attend work, starting on [date] __________________

Please check all that apply given the health information before you:

☐ This patient may/did return to work with no limitation on [date] __________________

☐ This patient needs further medical assessment before returning to work. Date of next appointment is (indicate NA if not applicable) [date] __________________

My opinion is based on the following factors:

☐ Information provided by the patient

☐ My examination of the patient and my assessment of the findings and health information

I have provided this Form to the patient named above.

Doctor’s signature: ____________________________ Date: ____________________________
**HR MONTH IN REVIEW**

A roundup of important new legislation, regulations, government announcements, court cases and arbitration rulings.

**LAWS & ANNOUNCEMENTS**

**Immigration**
July 14: HRSDC will now issue negative Labour Market Opinions to keep businesses linked to the sex trades, i.e., strip clubs, massage parlours and escort services, from hiring temporary foreign workers. Citizenship and Immigration Canada will no longer process new work permit applications of temporary foreign workers seeking to work in the sex trades businesses. The protections are necessary, says HRSDC, because these businesses are notorious for exploiting temporary foreign workers.

**Human Rights**
July 9: As compared to other adults, adults with disabilities are 50% less likely to complete a university degree, more likely to accept part-time rather than full-time employment and have lower annual incomes. These are among the sobering findings of a new Canadian Human Rights Commission report.

**Pensions—Defined Contribution Plans**
July 13: The Canadian Association of Pension Supervisory Authorities issued draft guidelines on administration of defined contribution pension plans. CAPSA guidelines are recommendations that each province must decide whether to adopt. Areas covered by the new DC guidelines include capital accumulation plans, governance, fund holder arrangements and prudent investment standards. Deadline for comments: Nov. 1, 2012.

**Pensions—IPPs**
July 9: Tax changes that took effect in January 2012 allow members of eligible Registered Pension Plans to withdraw minimum annual Individual Pension Plan amounts from the plan upon reaching age 71. To take advantage of the rule, the RPP must file a Form T-920 amendment to include the IPP minimum withdrawal requirement. But now the CRA has pre-approved a generic form that plans can use until Dec. 1, 2012 in lieu of the T-920 (announced in notice PR 2012/07/09B Rev).

**Pensions—Benefits Cuts**
July 9: Section Sec. 10.1(2)(a) of the PBSA requires the Office of the Superintendent of Financial Institutions approval of defined benefit pension plan amendments that reduce member benefits (or accrued credits) retroactively. A new Instruction Guide explains what DB plan administrators must do to get OSFI approval of these so called reducing amendments.

**Minimum Wage**
Oct. 1: The minimum wage is increasing 25¢ to $10.25 per hour.

**Employment Standards**
Aug. 1: Bill 35, the Retail Businesses Holiday Closing Act, which allows retail businesses to stay open longer on Sundays, took effect. Municipalities must decide for themselves on Sunday hours and about employees’ rights to refuse work on Sundays. What’s not going to change are the current shopping restrictions on Good Friday, Easter Sunday, Labour Day, Canada Day, Remembrance Day, Christmas Day and New Year’s Day.

**Workplace Safety**
Sept. 14: All comments on the Manitoba Workplace Safety and Health Act are due. The law requires the government to review the Act at least once every 5 years. On a related note, the government hired a new investigation official whose job will be to determine if the government should bring criminal charges against employers after serious accidents under C-45.

**Excluding EI from WCB Benefits Is “Social Condition” Discrimination**
A seasonal worker from Newfoundland who got hurt driving a truck on the Territory’s ice roads claimed that WCB’s failure to count EI in his workers’ comp compensable income was discrimination based on his “social condition.” The arbitrator agreed, finding that the trucker belonged to a socially identifiable group—seasonal workers who live outside the territory in areas of high unemployment, have to work far from home and earn less than average wages in the province. Not counting EI benefits to even out the differences in earnings was discrimination, the arbitrator reasoned. The court upheld the ruling as reasonable [Northwest Terr. (Workers’ Comp. Bd.) v. Mercer, [2012] N.W.T.J. No. 62, July 12, 2012].

**Worker’s Compensation**
July 9: As in the Northwest Territories, the 2013 average assessment rate in Nunavut is going up from $1.77 to $2.05 per $100 of assessable payroll. WSCC says that rising healthcare costs and the lousy economy have made it impossible for the agency to keep subsidizing assessment rates. The WSCC will release final rates for industry groups in October.

**Employer Must Pay $20K for Improper Performance Review**
A newly diagnosed diabetic telecom employee returning to work after a one-month leave of absence found that job stress made it hard to control her blood sugar. As a result, she was often ill and her work suffered. So when it came time to downsize, the company relied on her negative performance reviews to winnow her out. But in failing to consider how her illness affected job performance, the company violated its duty to accommodate, the Human Rights Tribunal ruled and ordered the company to pay $20,000 for disability discrimination [Grant v. Manitoba Telecom Services, 2012 CanLII 35367 (CHRT)].

**Employee Sues His Own Union for Incompetence**
A CRA tax auditor got so fed up with how the union was handling grievances that he decided to pursue the case on his own. He then filed an unfair labour practice claim against the union. The Public Service Relations Board found no evidence that the union represented the auditor negligently or in bad faith and dismissed his claim. The appeals court upheld the Board's ruling as reasonable [Boulos v. Public Service Alliance of Canada, [2012] F.C.J. No. 832, June 25, 2012].

**Compliance**
July 16: Yukon and Saskatchewan signed a formal Accord agreeing to work together on common issues like employee skills training, health care, environmental protection, education and research and innovation for the next 5 years.
**LAW & ANNOUNCEMENTS**

**Minimum Wage**
Sept. 1: The minimum wage increased 35¢ to $9.75 per hour. The rate for liquor servers will remain $9.05 until the general minimum wage hits $10.05. Thereafter, the 2 rates will remain exactly $1.00 apart with future adjustments based on indexing.

**Drugs & Alcohol**
July 3: Employers, labour associations and unions began a 2-year project to hammer out best practices for random alcohol and drug testing of workers at safety-sensitive work sites that can be adopted across Alberta.

**Workplace Safety**
July 23: An auditor general’s report criticizes the government for not doing enough to address the workplace safety enforcement concerns raised in its 2010 audit. Of the 5 recommendations, only 2 are on track for implementation.

**Prescription Drugs**
July 1: New rules took effect allowing pharmacists to bill the government for medical services that previously only doctors could provide, e.g., injecting drugs and altering prescriptions based on patient health records. Letting pharmacists deliver primary health care is intended to cut medical costs by reducing reliance on doctors.

**CASES**

**OK to Suspend Nurse for Wishing Death on Her Patient**
A hospital suspended a nurse for making abusive remarks about a seriously ill patient on a ventilator including wishing that he’d die soon. Although the patient had given the nurse grief—calling her a b*** and perhaps adding an f**** gerund to the description—even the union acknowledged that the remarks were grounds for discipline if she really made them. But the nurse denied the charge. In a close case, the arbitrator believed the witnesses, including a hospital chaplain, who claimed they heard the remarks and upheld the suspension [Leguee Grievance, [2012] A.G.A.A. No. 36, June 25, 2012].

**Lack of Work Assignments ≠ Constructive Dismissal**
An oilfield supervisor claimed the company stopped assigning him to jobs in retaliation for bringing ESA stat holiday pay claims. The court said there was no evidence that the lack of assignments was retaliatory and tossed out his constructive dismissal lawsuit. Falloofs in assignments were typical for the industry and something the supervisor and his co-workers had experienced many times before. And there was nothing in his employment contract guaranteeing him minimum work [Bonsma v. Tesco Corp., [2012] A.J. No. 668, June 25, 2012].

**Ex-Employee Can’t See Private Emails about Co-Workers**
An energy company employee fired after 4 years of service demanded access to his complete file—payroll records, emails and information provided to other organizations about projects he was involved with. The company provided most of the items but withheld 4 pages of emails naming or referring to third parties to protect their privacy. No problem, said the Privacy Commissioner. The employee was entitled to information about himself, not about others [Talisman Energy Inc., Order P2012-04, June 22, 2012].

**Chinese Company Must Stand Trial for Safety Violations in Canada**
Alberta charged a company owned by the Chinese government for 53 OHS violations after 2 of its oilsand workers were killed on the job. The accident happened in Alberta. But the company claimed it had no official presence in Canada and wasn’t subject to Alberta law. After losing in the provincial courts, the company appealed to the Supreme Court of Canada. But the Court refused to take the case. Result: The ruling stands and the company will be tried under Alberta OHS law [Sinopec Shanghai Engineering Co. v. Alberta, [2012] S.C.C.A No. 31, July 12, 2012].

**Family Law**
July 17: If you or any of your employees have questions about divorce, custody, child support, domestic violence or other domestic issues, check out the government’s new family law website, www.nsfamilylaw.ca.

**CASES**

**Workers’ Comp Covers Aggravation of Smoker’s Pre-Existing Lung Disease**
A plant worker with chronic obstructive pulmonary disease (COPD) caused by smoking claimed that exposure to fumes at work aggravated her condition. The Appeals Tribunal said there was enough evidence to support her claim. And even though she had a pre-existing condition, she’d be entitled to benefits if work-related exposure permanently aggravated it [Re: 2010-329-AD, [2012] CanLII 35360 (NS WCAT), June 26, 2012].
LAWS & ANNOUNCEMENTS

Workplace Violence
Sept. 28: That’s the deadline to comment on WorkSafeBC’s proposed new bullying and harassment policy listing what employers must do to prevent workplace bullying and harassment:
- Perform risk assessments
- Implement written bullying and harassment policies
- Establish system for reporting and investigating incidents
- Notifying employees of harassment and bullying hazards
- Provide support for victims of harassment and bullying.

Workers’ Compensation—Mental Stress
July 1: WorkSafeBC changed its policy on mental stress, C3-13.00, in response to Bill 14, which extends workers’ comp coverage to mental stress developed gradually at work over time, and not simply stress suffered immediately in response to a discrete, traumatic event at work. The new policy provides the details about the kinds of gradual mental stress workers’ comp will cover.

Workers’ Compensation—Older Workers
July: Some key data about injuries to workers 55 and older from WorkSafeBC’s 2011 Statistics book:
- 70% of fatalities caused by occupational disease from asbestos exposure
- 30% of non-motor vehicle injuries caused by falls
- Rate of hearing loss from noise exposure 4 times higher than for younger workers
- Suffer fewer injuries than younger workers but take longer to recover from serious injuries.

Privacy
July 25: The BC Privacy Commissioner says government criminal background checking is violating the privacy of prospective employees. Recommendations:
- Limit number of positions requiring criminal checks
- Do new criminal checks of current employees every 5 years at most and only for sensitive positions
- Eliminate multiple checks on same employee, e.g., upon transfer
- Notify applicants/employees of information collected. CASES

Employee Says She Got Laid Off for Complaining about Sex Assault
Seasonal layoffs were part of life for veteran log scalers like Ms. Wood. But in 2007, confidence in recall wasn’t high. Business was slow; and Ms. Wood had just gotten the cold shoulder for complaining about being sexually assaulted by a logging driver. So when she saw less senior colleagues getting recalled while her own phone remained silent, Ms. Wood took $50,000 in government aid under the Community Development Trust. In 2011, she sued her ex-employer for $25,000. But the court dismissed the case because: a. there was no evidence that the sex assault had anything to do with her not being recalled; and b. in accepting CDT aid, Ms. Wood waived all claims against the company [Wood v. Pottom Services Ltd., [2012] B.C.J. No. 1396, July 3, 2012].

Disability Discrimination Scorecard: Employee 2, Employer 1n
A health care worker with an arthritis-like condition filed 3 disability discrimination complaints. The employer argued that she had no reasonable chance to prove her claims and asked the BC Human Rights Tribunal to toss out the case. Outcome: There was enough evidence for the employee to go to trial on 2 of her 3 claims [Lloyd v. Compass Group Canada Inc., [2012] B.C.H.R.T.D. No. 228, June 28, 2012].

Discontinuing Bonuses = Constructive Dismissal—Even in Hard Times
A masonry foreman claimed constructive dismissal because he didn’t get bonuses for completing his last 2 projects the way he had in the past. Hey, times are tough, the employer countered. But the court found constructive dismissal anyway. Even though the written contract didn’t say anything about bonuses, bonus payments were a big part of the foreman’s compensation since at least 2005. And while tough times may warrant renegotiation, they don’t give employers the right to impose major pay changes unilaterally [Piron v. Dominion Masonry Ltd., [2012] B.C.J. No. 1511, July 18, 2012].

LAWS & ANNOUNCEMENTS

Workplace Safety
Sept. 3: Saskatchewan announced that changes to the OHS Act scheduled to take effect today have been pushed back indefinitely for further study. Areas of concern:
- Tickets for summary offences
- Designation of prime contractor to coordinate safety multiple employer sites
- Increases in penalties.

Privacy
June 26: The Saskatchewan Information and Privacy Commissioner’s 2011-2012 Annual Report calls on the province to adopt 2 new laws:
- Whistleblower protections for employees
- Employee privacy laws so that employees of private sector companies have the same privacy protections as those in the public sector.

Cases
Posting Job Notice Doesn’t Violate Seniority Clause
A collective agreement required a hospital to hire for vacant nursing positions on the basis of seniority. Posting a job notice to replace a registered nurse going on maternity leave instead of just promoting the most senior qualified applicant violated the agreement, the union claimed. No it didn’t, the arbitrator ruled, because none of the nurses with the requisite seniority had the skills needed for an RN position [New Brunswick Nurses Union V. Horizon Health Network (Ingraham Grievance), [2012] N.B.L.A.A. No. 11, July 6, 2012].

Business Loans
July 11: The government raised the lending limit of Small Business Loans Associations loans from $15,000 to $20,000. SBLA loans help small businesses that can’t get financing from banks and traditional lending institutions get the money they need to develop and grow.

Cases
Arbitrator Can Rule on Labour Case Even Though It Raises Constitutional Issue
A Regina prison fired a guard after police picked her up for being drunk and in the company of an ex-inmate in violation of a policy banning personal relations between guards and offenders. The guard denied being friends with the inmate and claimed she just ran into him on the street, something to be expected given that they both belonged to the same First Nation. With 80% of inmates being aboriginal, it was inevitable that she’d run into some ex-inmates on the street once in a while, she argued. The prison tried to get the case tossed out of labour arbitration because it raised a Charter issue. But the arbitrator said, and the appeals court agreed, that it was basically a case about labour relations that the arbitrator could hear [Sask. (Ministry of Corrections) V. SGEU, [2012] S.J. No. 437, June 29, 2012].

Labour Relations
June 21: Bill 37, which would change the labour relations law, got third reading and will probably pass before session’s end. Highlights:
- Union certified when 65% of employees sign union card
- Right of employers and unions to call vote on making most recent offer the collective agreement
- Minister can appoint mediator for first collective agreement upon 60 days’ notice
- Stiffer punishments for not bargaining in good faith
- Union and management can demand labour management committee.

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**LAWs & ANNOUNCEMENTS**

**Human Rights**

**July 17:** In its 2011-2012 Annual Report, the Ontario Human Rights Commission lists its key achievements for the year. Highlights:
- New guidelines for resolving competing human rights claims
- Progress in revising policy on creed and religious accommodation
- Drafting standards to implement Accessibility for Ontarians with Disabilities Act
- Largest consultation in Commission history—on discrimination against persons with mental health or addiction disabilities.

**Labour Relations**

**July:** OLRB rulings in the past month:
- Vote denying certification to incumbent union upheld because no evidence employees were intimidated
- Ruling that employer subject to OLRB regulation upheld even though it only does construction work occasionally
- Certification overturned because union reps used threats of higher dues to influence vote
- Board refuses to appoint new arbiter to hear vacation grievance.

**Pensions**

**July 1:** A slew of pension law changes took effect. Highlights:
- Grow-in benefits for terminated employees who meet the 55 threshold (combined age + years continuous employment/plan membership)
- Right of plan to opt out of grow-ins
- Elimination of partial wind up
- New rules for employer withdrawals of plan surplus
- Immediate vesting of pension benefits
- Right of members to access plan records electronically or by mail
- Right of ex-spouses to get plan records needed for child support and other family law claims
- New rules for transfer of unlocked benefits to RRSP or RRIF.

**CASES**

**Handing in Key ≠ Resignation**

He started as a waiter but over 10 years became manager, good friend and trusted confidant of the owner. So when it came time to sell the restaurant, it was only fitting that Peter should buy it. But things went horribly wrong. The sale fell through at the last minute, Peter took ill and when he returned, the air was filled with tension. Things came to a head when Peter was passed over for promotion. Although he may or may not have uttered the phrase “I quit,” what he clearly did was hand in his keys and stay away from work for several weeks. The owner told Peter he wasn’t fired and asked if he was coming back—but got no response. In these circumstances, it wasn’t unreasonable for the owner to find that Peter had quit, said the judge, and threw out Peter’s constructive dismissal lawsuit [Rapinis Ristorante], [2012] O.J. No. 3326, July 18, 2012.

**Firing Veteran Employee for Not Getting Doctor’s Note Is Overreaction**

A Yellow Pages sales consultant took short term disability leave for hypertension and work-related stress. But his doctor didn’t return the medical forms the company’s disability insurer needed. So the company terminated his benefits and insisted that he either furnish the documentation or return to work by March 3. He did neither. So after 20 years of spotless service, Yellow Pages terminated his employment. The arbitrator upheld the termination; and so did the divisional court. But the Court of Appeal had the final word. Although Yellow Pages might have followed the letter of the law with regard to notification and warning, firing a senior employee for such a minor offence was disproportionate and a new arbitrator would have to decide if the penalty was warranted [Canadian Office & Prof. Employees v. Yellow Pages Group Co., [2012] O.J. No. 2880, June 26, 2012].

**One-Time Bonus Payments ≠ Pensionable Income**

After 5 years, a senior hospital HR official renegotiated the severance provisions of his contract that would have actually paid him a higher bonus if his employment was terminated. Later, when he retired, he claimed that the “retention bonuses” he got under the deal were pensionable income toward his retirement pension. The court disagreed. The pension plan defined “pensionable earnings” as amounts that “form a regular and integral part of the member’s remuneration.” The retention bonuses, the court explained, were one-time payments that weren’t expected to be made on a regular basis [Shaw v. Healthcare of Ontario Pension Plan, [2012] O.J. No. 3193, July 2, 2012].

**$30K OHS Fine Could Be Record High for a Supervisor**

$30,000 now seems to be the upper end of the spectrum for supervisor OHS fines in cases where a worker gets killed or seriously injured. Exhibit A: A bridge construction supervisor was fined $30,000 for knowing about but not following engineering safety procedures for concrete removal and allowing workers to do the operation without fall protection. The case began when a concrete panel collapsed and fell on a worker crushing him to death. The fact that the supervisor was also president of the company contributed to the high fine [Barry Wood, Govt. News Release, July 12, 2012].

**Employer & President Sentenced in Christmas Eve Scaffolding Tragedy**

On Dec. 24, 2009, 4 workers died and another was seriously injured when a swing-stage scaffold collapsed. In June, their employer pleaded guilty to criminal negligence causing death under the Criminal Code as amended by Bill C-45, while its president pleaded guilty to four OHS violations. The court fined the employer $200,000 and the president $90,000. All criminal charges against the president were dropped [Metron Construction and Joel Swartz, Govt. News Release, July 13, 2012].

**Manager Can’t Sue Union for Personal Remarks on Union Blog**

The manager of a jail sued the union for sex and marital status discrimination stemming from comments about her made on the union’s blog. The Human Rights Tribunal found that the statements weren’t discriminatory; and even if they had been, the manager had no claim because the comments related to workplace issues, an area in which the union had a constitutional right to express its opinions [Taylor-Baptiste v. Ontario Public Service Employees Union, [2012] HRTO 1393 (CanLII), June 16, 2012].

**Company Doesn’t Need Committee Permission to Implement Safety Rule**

An arbitrator ruled that a steel plant could unilaterally implement a safety rule requiring employees to wear chin straps attached to safety headgear. The union’s position that the Joint Health and Safety Committee must consent to new safety rules was inconsistent with the employer’s OHS duties that would potentially render the company liable for health and safety offences caused by the Committee’s intransigence [Gerdau Ameristeel (Whitby Plant) v. United Steelworkers, Local 6571, [2012] CanLII 41114 (ON LA), July 19, 2012].

**Ok to Fire Employee for Throwing Things at Co-Workers**

An employee got angry with his co-workers and hurled a steel pipe in their direction. Although nobody was hit, the employee was suspended on the spot. He stormed out but not before throwing his gloves and arm sleeves toward the supervisor. In upholding his termination, the arbitrator pointed to the employee’s history of quick tempered outbursts, failure to complete anger management and unwillingness to apologize or express remorse for his actions [Walker Exhausts v. USW (Local 2884), [2012] CanLII 42290 (ON LA), July 19, 2012].

**LAWs & ANNOUNCEMENTS**

**Workplace Safety**

**July 18:** The form you use to report a workplace injury to the PEI WCB, the Employer’s Report Form 7, has been revised. Key change: A new section on return to work designed to get the RTW process going as soon as a workers’ comp claim is received.

**Workers’ Compensation**

**July 9:** The WCB made improvements to Online Services that enable employers to:
- Create a favourite companies list to speed up access to clearance information
- Get automatic email notifications of changes to clearance status of companies on favourites list
- Update the company’s WCB account information
- Export claims costs data to the company’s own systems
- File Costs of Claims reports paperlessly.
THE LAW OF DRESS CODES

Dress and appearance policies pit the employer’s right to regulate workplace conduct against the employee’s right of self-expression. Dress code “law” is basically the accumulation of cases in which courts and arbitrators have sought to balance these competing interests.

The Rule: Employers are allowed to implement a dress code as long as it:
- Serves a legitimate purpose that can’t be accomplished via less restrictive methods;
- Is clear and unambiguous about what’s banned and permitted;
- Doesn’t violate the collective agreement (in a union workplace);
- Doesn’t discriminate on the basis of gender, race, religion, etc.; and
- Is consistently enforced.

The best way to explain how the dress code rules work “in real life” is to show you some of the key cases. Instructions: We’ll explain the situation. You make the call about whether you think the dress code is legal. We’ll then reveal how the case turned out and why.

YOU MAKE THE CALL—IS DRESS CODE LEGAL?

1. Nurses Can’t Wear False Fingernails
Situation: Nursing home infection control policy bans staff who treat patients or prepare medications from having “colored nail polish, false fingernails or sculpted fingernails.”
Outcome: Policy is valid because it serves a compelling health interest.
Reason: Key to case: Employer’s evidence that fungi, bacteria and viruses from artificial nails pose an infection risk that couldn’t be controlled by making employees wear gloves. [Stocking Grievance, [2008] A.G.A.A. No. 67, Dec. 4, 2008].

2. Kitchen Staff Can’t Wear Facial Jewelry
Situation: Hospital disciplines kitchen workers for wearing nose studs.
Outcome: Dress code ban on dietary staff wearing facial jewelry struck down because there’s no proof it’s necessary for sanitation.
Reason: The employer lost because it couldn’t show that nose piercings and wearing nose studs increased the risks of transmitting disease [Russell Grievance, [2004] O.L.A.A. No. 141, April 5, 2004].

3. Resort Staff Can’t Wear Skechers
Situation: After a fall incident, a resort adopts a Joint Health and Safety Committee recommendation and bans Skechers shoes with curved platform soles.
Outcome: The policy is invalid because it limits employees’ personal choices in comfortable footwear without promoting safety.
Reason: Although well intentioned, the spa and JHSC adopted the policy hastily based on speculation and anecdotal internet reports suggesting that curved platform sole shoes pose a fall hazard without conducting a thorough hazard assessment of their own [Footwear Grievance, [2012] B.C.C.A.A.A. No. 68, May 16, 2012].

4. Store Staff Must Be Clean Shaven
Situation: Supermarket disciplines clerk with neatly clipped goatee for violating no beards rule.
Outcome: Policy is valid because it serves an important business purpose.
Reason: Employer used customer surveys showing that having clean shaven employees was important to customers and sales to justify no beard rule in its personal appearance and grooming policy [Morgan Grievance, [1998] A.G.A.A. No. 94, Nov. 10, 1998].

5. Respirator Users Can’t Have Beards
Situation: Pulp mill employee’s religion forbids men from shaving. So he claims that a policy requiring users of tight-fitting respirators to be clean shaven is religious discrimination.
Outcome: Policy is justified because it’s necessary to accomplish an overriding safety purpose.
Reason: Facial hair interferes with the tight seal required to keep out poisonous gases. So letting him use a respirator without shaving would endanger not only the employee’s life but those of any co-workers who rely on him for their own safety [Pannu v. Skeena Cellulose Inc., [2000] B.C.H.R.T.D. No. 56].

6. Store Staff Must Tuck In Shirts
Situation: Food store requires all employees to tuck in their uniform shirts at the waist.
Outcome: Policy is unreasonable because its real harm outweighs its speculative benefits.
Reason: The store used marketing surveys to show that staff neatness and professional appearance was important to customers; but it couldn’t prove that a tucked in shirt promoted the desired image. What was not speculative was the embarrassment and humiliation employees with particular physical characteristics—beer bellies, large bust lines and general portliness—would experience by having to wear their shirts tucked tightly into their waistline [Calgary Co-Operative Ltd. v. Union of Calgary Co-op Employees, [2006] A.G.A.A. No. 1, Jan. 2, 2006].

7. Teachers Can’t Wear Jeans
Situation: Public school bans teachers from wearing blue jeans and sweat pants.
Outcome: Policy is more restrictive than it has to be.
LIMITS OF DRESS CODES CONTINUED FROM PAGE 9

**Reason:** All sides agreed that the dress code served a compelling purpose—ensuring that teachers’ dress was professional and reflective of their role model status. But would wearing blue jeans and sweat pants really make a teacher any less of a role model? No it wouldn’t, reasoned the arbitrator, citing occasions like outdoor activities and field trips to casual settings like sporting events where nobody would bat an eye at a teacher for dressing casually. So, in categorically banning jeans and sweats, the dress code went too far [Dress Code Grievance, [2012] O.L.A.A. No. 205, April 4, 2012].

**8. Waitresses Must Wear Bikini Tops, Waiters Must Wear Hawaiian Shirts**

**Situation:** Night club requires cocktail waitresses to wear bikini tops and waiters to wear Hawaiian shirts for a fundraiser with a beach theme.

**Outcome:** Nightclub is liable for sex discrimination.

**Reason:** Although men and women dress differently, dress codes must provide equivalent treatment to each gender. Bikini tops accentuate gender; Hawaiian shirts are gender-neutral. So the club’s “dress code” discriminated against female employees on the basis of gender [Mottu v. MacLeod, [2004] B.C.H.R.T.D. No. 68, Aug. 9, 2004].

**9. Men Can’t Wear Earrings**

**Situation:** Dress code of historical park trying to recreate early 20th century trading post bans jewelry not worn during the period, including earrings for men and lip, eyebrow and nose rings for both sexes.

**Outcome:** Dress code doesn’t discriminate on the basis of gender.

**Reason:** Recapturing the early 20th century as accurately as possible was a legitimate and compelling interest and the park used historical research to show that people didn’t wear facial jewelry back then [Callahan v. Capilano Suspension Bridge, 2009 BCHRRT 127 (CanLII), April 7, 2009].

**Conclusion**

“Should we really care about what our employees wear?”

This final part of the Insider member’s question is the key one. Employer regulation of dress and personal appearance in the workplace isn’t just a legal issue; it’s a matter of morale, productivity and employee relations. It’s a road you only want to go down when you have a compelling need for employees to dress a certain way and the evidence to demonstrate that implementing the dress code is the only way to accomplish it. As the cases above demonstrate, this is a tough burden for an employer to meet.

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**HIRING & RECRUITING**

**ASK THE EXPERT: Asking about Workers’ Comp Claims in Job Interview**

**TODAY’S EXPERT:** Glenn Demby is a lawyer and the editor-in-chief of HR Insider. The following questions come from an Insider member.

**QUESTION 1:**

Can you ask job applicants if they’ve ever had any workers’ comp claims?

**ANSWER:**

No!!

**EXPLANATION:**

You can’t factor a job applicant’s physical or mental disability into your hiring decision. Because they solicit information about conditions that may constitute disabilities, questions about workers’ comp claims aren’t allowed during the interview/pre-employment process.

It’s not just workers’ comp claims. Other interview questions that aren’t allowed because they relate to disabilities include asking applicants about:

- Their general health and medical history;
- Previous injuries, illnesses or mental disorders;
- Physical or intellectual limitations;
- How many sick days they’ve taken;
- What medications they use;
- Allergies or predisposition to medical conditions;
- Substance abuse problems;
- Whether they’re seeing a doctor;
- Insurability under benefits plans; and
- Whether they need accommodations.

**QUESTION 2:**

If the job is physically demanding, can we ask interviewees if they have any health or medical conditions that would affect their work?

**ANSWER:**

No again.

**EXPLANATION:**

Questions to job applicants about medical limitations are still illegal even if you phrase them so they relate to job performance. However, there are 3 things you can do when hiring applicants for jobs that are physically demanding:

1. Make it clear in the job description, application or ad that the work is strenuous—this should keep people who have physical limitations from applying in the first place;
2. When extending a job offer, let applicants know that the employment is contingent upon their passing a job-related medical exam. For example, ask the applicant to sign an acknowledgement with language to the effect:
   “I understand that a job-related medical examination is required and that the offer of employment is contingent upon my completing the exam satisfactorily.”
3. Administer the exam after the applicant accepts the offer and signs the acknowledgement.

**GOT A QUESTION FOR OUR EXPERTS?** Submit it to glenn@bongarde.com
TERMINATION

CASE OF THE MONTH

BC Case Shows How Wrong “Culminating Incident” Ruins Progressive Discipline

The first goal of progressive discipline is to turn wayward employees around; the second goal is to set the stage for termination when employees don’t improve. The big challenge for HR directors is recognizing when to shift from redemption to termination. General rule: There must be one final straw-breaks-the-camel’s-back violation, or “culminating incident,” demonstrating that the employee can’t be salvaged and further progressive discipline is pointless. The problem is that employers have the burden of proving a “culminating incident”; and if it turns out that you were wrong to treat a violation as a culminating incident, it can undo the entire progressive discipline case you took months—even years—to prepare. A BC employer learned that lesson the hard way.

THE CASE

What Happened: The case involved a 55-year-old entry level drug store cashier who complained after a co-worker kicked her in the buttocks. Management’s response: You’re fired! You see, the whole incident was captured on film by the store’s video surveillance camera. The footage showed that the cashier exaggerated what happened. Coupled with previous performance problems, management treated the embellished complaint as the culminating incident and fired her.

What the Court Decided: The BC Provincial Court ruled that the employer didn’t have just cause to cashier the cashier.

How the Court Justified Its Decision: The cashier’s account of the incident was exaggerated, the court acknowledged. But getting kicked in the behind by a co-worker is still serious. Brushing aside the complaint as “much ado about nothing” and harmless joking around would have been bad enough, the court continued. Actually punishing her for complaining was completely unjustifiable. So the court found the termination wrongful and awarded the cashier 4 weeks’ notice for her 9 months’ service.


ANALYSIS & IMPACT ON YOU

There are 3 important lessons for HR directors to take from Scholer:

1. Pick the Right Culminating Incident

Although it’s something of an extreme example, Scholer is hardly the first case where an employer was undone by jumping the gun on the culminating incident. The key point is that courts and arbitrators don’t consider a violation to be a culminating incident just because an employer says it was. They’ll look at the incident for themselves to determine if you were justified in treating it as a clear indication that progressive discipline has failed and that further efforts to redeem the employee would be useless.

The Bottom Line: Stay patient with the progressive discipline process and don’t proceed to termination unless and until you’re sure you have a violation you can “sell” as a culminating incident.

2. Document Progressive Discipline

The Scholer court also faulted store management for its “cavalier” failure to document previous warnings supposedly delivered to the cashier. So even if the store had delivered a solid culminating incident, it probably would have still lost the case because of its lack of written documentation.

The Bottom Line: Keep careful records documenting each act of progressive discipline you impose.

3. Think about What You Look Like

Wrongful termination cases are often one part legal proceeding, one part morality play where the “good guy” always wins. These contests naturally favour the employee. To overcome this sympathy disadvantage, employers need not only a technically solid legal case but a story the judge/arbitrator finds sympathetic.

The Bottom Line: When preparing to terminate employees, try to think about not only your legal case but how you’re likely to come across to a third party. Ask yourself: “What’s it going to look like if we do this thing?”

The store in Scholer lost because it lacked such perspective. Clearly, the cashier was a difficult employee that management couldn’t wait to get rid of. But somebody at the store should have had the judgment and objectivity to understand that the decision to fire an employee for complaining about getting kicked in the behind by a co-worker would be impossible to defend.
Are Injuries in the Company Gym Covered by Workers’ Comp?

SITUATION

Gett Tinn Shape Industries opens an on-site weight room as part of its wellness program. All employees are encouraged—but not required—to use the facilities. One employee who takes advantage is sales manager, Jim Ratt. Although his job involves no physical activity, Jim is a fitness buff who lifts weights at lunch at least 3 times a week. During one of his regular lunch break workouts, Jim injures his knee. He files a workers’ compensation claim for the injury.

QUESTION

Is Jim’s injury covered by workers’ comp?

A. No, because the injury occurred while Jim was on lunch break.
B. No, because Jim chose to use the facilities and wasn’t required to do so as part of his job.
C. Yes, because the injury occurred in the workplace at a facility the employer provided.
D. Yes, because injuries to employees participating in company-sponsored wellness programs are work-related.

ANSWER

B. The injury isn’t covered because the work out was personal rather than work-related activity.

EXPLANATION

Many organizations have on-site athletic facilities for their employees. This scenario, which is based on an Alberta case, illustrates whether injuries suffered by employees using company facilities are considered work-related under workers’ comp.

The general rule: Such injuries are work-related if they occur during workouts employees must do as part of their job, e.g., to prepare for a mandatory physical fitness exam or maintain a level of fitness required for the position. But Jim was working out in the weight room not because his job required him to but voluntarily as part of his personal fitness regimen. As a result, workers’ comp would deny his claim.

WHY WRONG ANSWERS ARE WRONG

A is wrong because injuries suffered during lunch breaks might be covered by workers’ comp depending on where and how they occur. To the extent employees get hurt on the worksite carrying out a work-related activity, the injury would be covered even if they were on a lunch or other break at the time.

C is wrong because injuries aren’t automatically work-related because they happen at the workplace. For example, workers’ comp doesn’t cover injuries employees suffer at work while horsing around or performing activities they’re not allowed to engage in such as driving a forklift without proper training and authorization.

D is wrong because encouraging employees to work out as part of a wellness program doesn’t make the activity a job duty. Workouts would still be deemed voluntary. The result would be different, of course, if Gett Tinn Shape had required employees like Jim to use the weight room.

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