EI Benefits of Employees Who Quit their Job

Employment insurance (EI) is supposed to cushion the blow of losing a job—at least financially. So if employees choose unemployment and deliberately quit their job, they don’t qualify for EI benefits.

At least, that’s the general rule. But there’s one big exception. Employees who leave voluntarily can collect EI benefits if they can show they had “just cause” to leave. Although it’s up to Service Canada, not you, to determine if an ex-employee qualifies for EI benefits, you need to understand the rules of “just cause” to calculate and withhold EI payments and complete the Record of Employment (ROE). Here’s how to make an EI just cause evaluation.

What the Law Says
Section 30 of the federal Employment Insurance Act says that an employee who voluntarily leaves any employment without just cause isn’t entitled to benefits. The rule sounds simple enough. But there are 2 issues that you need to understand to apply it in actual situations.

1. What ‘Voluntarily’ Means
“Voluntarily” leaving generally means that the employee rather than the employer took the initiative in ending the employment. Saying “I quit” is the most obvious example. But Sec. 29(b) of the Act lists others including:
- Refusing a job offered by the employer as an alternative to anticipated loss of employment;
- Refusing to resume a job after an absence; and
- Refusing to continue in a job after the employer sells or transfers the business to another employer.

2. What ‘Just Cause’ for Leaving Means
Although leaving voluntarily is one strike, claimants can still qualify for EI benefits if they can show that they had “just cause” for leaving. Sec. 29(c) lists examples of “just cause,” including:
- Sexual or other harassment;
- The obligation to accompany a spouse, common-law partner or dependent child to another residence;
- Discrimination banned by the Canadian Human Rights Act;
Dangerous or unhealthy working conditions;
The obligation to care for a child or member of the immediate family;
“Reasonable assurance” of other employment “in the immediate future” (see below for an explanation of what this means);
“Significant modification” of terms and conditions affecting wages or salary;
Excessive overtime or an employer’s refusal to pay for overtime work;
“Significant changes” in work duties;
Antagonism with a supervisor (as long as the employee isn’t primarily responsible for that antagonism);
Illegal practices by the employer;
“Undue pressure” by an employer to leave the employment;
Discrimination because of membership in an association, organization or union of workers; and
“Any other reasonable circumstances.”

Lessons from the Cases
The Sec. 29(c) list isn’t exhaustive. Cases decided by a judge or umpire flesh out what does and doesn’t count as just cause. Key lessons from the case law:

1. Going Back to School Is Not Just Cause
Leaving a job to return to school (including vocational studies) is generally not considered “just cause.” Although an employee may have sound reasons to go back to school, in the words of one court: “We feel it is contrary to the very principles underlying the unemployment insurance system for that employee to be able to impose the economic burden of his decision on contributors to the fund” [Canada v. Martel].

2. Inadequate Pay Is Not Just Cause
Courts have consistently ruled that employees who quit because they’re dissatisfied with their pay don’t have just cause. According to one case, “the fact that in the claimant’s view an employment is not sufficiently well paid certainly cannot as such justify him in abandoning it and compelling others to support him through unemployment insurance benefits” [Canada v. Tremblay].

3. ‘Reasonable Assurance’ of Future Employment Means an Actual Job Offer
Sec. 29(c) lists “reasonable assurance” of another job in the “immediate future” as a reason that does count as just cause. If the job falls through, the employee is entitled to benefits. But that other job must be all but in the bank to count as “reasonable assurance.” Simply leaving to look for a job falls short of “reasonable assurance”—even if there’s a specific job the employee is targeting and even if the employee has an excellent chance to land the position.

Example: An employee left his job in Halifax after a friend told him he could get work with a company in Manitoba. But when he arrived in MB, he discovered that the company wouldn’t be hiring any new employees for a few months. His claim for EI benefits was denied on the grounds that he had voluntarily left his employment without just cause. The court upheld the denial, ruling that “absent any offer by the prospective employer, any contact between that employer and the respondent, and any idea as to what the work or the remuneration would be, there is no ‘assurance’ and there is no ‘employment’” [Canada v. Sacrey].

The bottom line: “Reasonable assurance” of future employment means there must be an actual offer of employment on the table. The offer must also be non-conditional. A conditional job offer (e.g., “you’ll get the job if you successfully complete our training course”) doesn’t count.

One Final Step: Showing No Reasonable Alternative
The mere fact that an employee leaves for a reason that’s considered “just cause” isn’t enough to qualify for EI benefits. According to Sec. 29(c), employees must also show that they had “no reasonable alternative” to leaving the job under the circumstances. Quitting, in other words, must be more than just a reasonable option; it must be the only reasonable option.

Example: Sexual harassment is one of the reasons listed as “just cause.” However, an employee who’s being sexually harassed may have reasonable alternatives to quitting, such as filing a complaint against the co-worker who’s harassing her and seeking the employer’s protection. If so, she doesn’t have just cause to quit. It’s up to the courts to decide what alternatives the employee had.

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The most important reason to have written agreements in place is to provide certainty regarding your expectations and to govern how you will interact during the relationship, but they are also critical to establishing your respective obligations on termination of the relationship. This certainty alone can provide considerable peace of mind and cost savings by avoiding disputes and unnecessary litigation.

Minimize Liability
Besides certainty, a written employment agreement can serve to minimize an employer’s obligations upon termination. Many employers are surprised to learn that without a written agreement to the contrary, an employee is entitled to “reasonable notice” on termination, and that such notice can be up to 24 months or more of the employee’s gross salary and benefits — an amount that far exceeds the notice required by Ontario’s Employment Standards Act.

However, it is possible to craft an agreement that satisfies an employer’s obligations under the Employment Standards Act, but avoids the common law obligation to provide “reasonable notice” — a concept that by its very nature is vague and uncertain. This is because what notice will be reasonable depends on the individual circumstances of the employment relationship, including:

- Character of the employment;
- Length of service by the employee;
- Age of the employee; and
- Availability of alternative employment given the employee’s training and qualifications.

Careful Drafting is Essential
The Courts regard written employment agreements very critically. That is, before an employment agreement will be considered valid and enforceable, rebutting the presumption of reasonable notice, it must be clear and unambiguous, and must not violate any provision of the Employment Standards Act, or it will be considered null and void exposing the employer to considerable liability.

As a result, we encourage you to obtain professional assistance in preparing these agreements, and if you already have agreements in place, we recommend that you have them reviewed/updated by legal counsel to ensure they meet the higher standards that have recently been set by the Courts.

Tool
Model EI ‘Just Cause’ Evaluation Questionnaire
Here’s a Questionnaire you can use to evaluate whether an employee who leaves voluntarily qualifies for EI benefits.

**EI ELIGIBILITY QUESTIONNAIRE**
The purpose of this Policy is to establish ground rules for behaviour during employee social events and functions, including both company-sponsored and unsponsored events.

1. Did Employee Leave Voluntarily? ☐ Yes ☐ No
   **Instructions:** Answer Yes if Employee:
   - Quit
   - Refused a job offered as an alternative to unemployment
   - Refused to resume a job after an absence
   - Refused to continue in a job after the business was sold or transferred to another employer

2. Why did Employee Leave? [Supply the narrative]

3. Is the Employee’s Reason for Leaving Just Cause?
   ☐ Yes ☐ No
   **Instructions:** Answer Yes if the employee left because he was the victim of harassment or discrimination, had to accompany a spouse, common law partner or dependent child to another location, was subject to dangerous or unhealthy work conditions, had to care for a family member, was reasonably assured of another job in the immediate future, was forced to work or denied pay for overtime, was subject to significant changes in job duties, was antagonized by a supervisor or as a result of other reasonable circumstances. Answer No if the employee left to go back to school or was unhappy with his salary.

   **IF YOU ANSWERED YES TO QUESTION 3, PROCEED TO QUESTION 4. IF YOU ANSWERED NO, IT MEANS THE EMPLOYEE DOESN’T HAVE JUST CAUSE.**

4. Was Leaving the Employee’s Only Reasonable Option?
   ☐ Yes ☐ No
   **Instructions:** If you answered Yes, the employee likely had just cause. If you answered No, he likely does not.

**EMPLOYMENT CONTRACTS**
**Why You Need A Written Employment Agreement**

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CASE OF THE MONTH

Alberta Court: Making Foreign Professionals Pass Competency Tests ≠ Nationality Discrimination

Canada's willingness to accept skilled immigrants is not only laudable (particularly in light of developments in the U.S.) but increasingly vital to the national economy. But it also raises an uncomfortable question: Should foreign professional training be recognized as the equivalent of the required Canadian professional degree? There's a lot more at stake than morals. Bending competency standards to accommodate foreigners is inimical to the profession; but unwillingness to recognize foreign training may also lead to liability for nationality-based discrimination. A recent Alberta case illustrates how this dilemma plays out in real-life, not just in Alberta but all of Canada.

THE CASE

What Happened: An engineer from Slovakia with a pair of professional degrees immigrated to Canada in 1999. A year later, he applied for Professional Engineer status. The Association of Professional Engineers and Geoscientists of Alberta (APEGA) advised him that he’d have to pass the National Professional Practice Exam (NPPE) required of Canadian candidates. After failing the NPPE three times, the engineer changed tactics and sued. In a case that created a national sensation, the Alberta Human Rights Tribunal ruled that the APEGA committed nationality discrimination by refusing to recognize the engineer’s foreign degrees without individualized assessment. The Tribunal ordered it to re-evaluate his credentials and pay $10,000 in damages. Both sides appealed—the APEGA because it felt the Tribunal was wrong, and the engineer because he wanted damages of at least $1 million.

What the Court Decided: The Alberta Court of Queen’s Bench said the Tribunal’s ruling was wrong and reversed it.

How the Court Justified the Decision: Making immigrants take additional exams “restricts their ability to work in their respective professions and continues to perpetuate disadvantage in these groups [forcing them] to take lower paying jobs in other fields,” the court acknowledged. However, while it subjected immigrants to differential and unfavourable treatment, the APEGA policy was “reasonable” and not based on nationality. The APEGA wasn’t questioning the value of a foreign degree, the court reasoned. It simply couldn’t rely on that credential to fulfill its mandate of ensuring the competence of professional engineers; the confirmatory exam was the least restrictive and fairest way to accomplish that objective [Assoc. of Professional Engineers & Geoscientists of Alberta v. Mihaly, 2016 ABQB 61 (CanLII) Jan. 28, 2016].

But as the Mihaly and other similar cases from across Canada illustrate, reasonable accommodation doesn’t mean automatically accepting foreign credentials as being equivalent to Canadian ones. Requiring foreign applicants to pass competency exams or meet other additional requirements may be justified if the employer or professional association can prove that the policy:

1. Isn’t based on nationality or assumptions or pre-conceived notions about nationality;
2. Isn’t imposed on a blanket basis but considers the individual circumstances of applicants. Thus, for example, the APEGA policy in Mihaly provided for waiving of the NPPE test in certain circumstances, none of which applied in the engineer’s case;
3. Is necessary to maintain the professional standards that the employer or professional association is entrusted with upholding; and
4. Administered in the narrowest and least restrictive way possible.

WHAT IT MEANS

Human rights laws require employers to not only refrain from nationality discrimination but make reasonable accommodations up to the point of undue hardship.

Equivalency across Provinces

The issue of equivalency of foreign degrees also arises when Canadian professionals educated in one province seek to practice in another province or territory. Is an Ontario engineering degree the equivalent of an Alberta one—and vice versa? The good news is that employers and professional associations generally don’t have to make those determinations thanks to the existing network of interprovincial agreements affording mutual recognition to professional credentials and degrees across provincial boundaries.
**FEDERAL**

**LAWS & ANNOUNCEMENTS**

**Jobs**
Feb. 3: That’s the newly extended deadline for employers to apply for federal funding to hire students under the 2017 Canada Summer Jobs program.

**Employment Insurance**
Jan. 1: The waiting period to start receiving EI benefits has been reduced from 2 weeks to 1 week. Although the change has no impact on the maximum number of weeks of EI benefits claimants can receive, cutting the waiting period shifts the period during which those benefits are payable forward one week.

**Privacy**
Jan. 27: A majority of Canadians, i.e., over 70%, want tougher privacy laws and greater transparency about how companies and government agencies collect and use their personal information, according to a new Office of Privacy Commissioner survey. The Privacy Act hasn’t changed much since it was adopted in 1983, the Commissioner notes.

**Payroll**
Jan. 1: A non-resident employer may no longer have to file a T4 slip for salary, wages or other remuneration paid to a non-resident employee if the employer determines, after “reasonable enquiry,” that the employee’s total taxable income earned in Canada during the calendar year (including salary, wages and other remuneration) is $10,000 or less.

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**Pensions**
Jan. 3: OSFI issued a new Form 1, complete with new instructions, for pension plan beneficiaries to use to unlock their pension funds on the grounds of financial hardship.

**Tax**
Jan.: The 2017 income tax deduction limits and expense benefit rates for business use of an automobile:
- Deduction of tax-exempt allowances paid by employers to employees who use personal vehicles for business purposes remains 54¢ per km for first 5,000 kms and 48¢ for each additional km thereafter
- Exception: In the territories the allowance will remain at 58¢ per km for first 5,000 kms and 52¢ for each additional km thereafter
- 14¢ reduction in general prescribed rate to calculate taxable benefit of employees relating to personal portion of automobile operating expenses to 254¢ per km
- 14¢ reduction in general prescribed rate to calculate taxable benefit of employees relating to personal portion of automobile operating expenses to 254¢ per km (22¢ per km for those principally employed in selling or leasing automobiles).

**CASES**

**Class Action ‘OK’ Clears Way for RCMP Sex Harassment Settlement**
A pair of ex-RCMP officers made national headlines by suing their ex-employer for sexual harassment. The officers contend that female employees suffered decades of systemic, gender-based harassment and bullying encompassing everything from grabbing to practical jokes featuring ketchup-stained tampons. Now a federal court has ruled that the cases can go forward as class actions representing up to 20,000 members. The RCMP has already issued a public apology and earmarked $100 million for settlement [Merlo and Davidson v. The Queen, 2017 FC 51, Jan. 13, 2017].

**BRITISH COLUMBIA**

**LAWS & ANNOUNCEMENTS**

**Public Health**
Jan. 6: Starting in Sept., BC will extend its free human papillomavirus (HPV) vaccination program to boys in Grade 6. HPV affects females and males and coverage of Grade 6 girls hasn’t reached the levels expected, the government explains.

**Pensions**
Jan. 17: The Superintendent issued a new Pension Bulletin (Pens 17-001) reminding plan administrators of their obligation to offer both locked-in and non-locked-in options to members whose benefits qualify for lump sum transfer to an RRSP under the small benefit rule. Some administrators aren’t offering locked-in options, the Bulletin suggests.

**CASES**

**Firing Employees on Extended LTD Leave = Disability Discrimination**
With so many employees on LTD leave with no prospects of returning, an employer decided that extended non-culpable absence was grounds for termination and fired the 3 who had been absent the longest—10, 9 and 7 years, respectively. The union claimed disability discrimination and the arbitrator agreed. Termination for non-culpable absence isn’t discrimination when employees remain unable to work for the foreseeable future even after the employer tries to accommodate them. But, the arbitrator continued, the firings in this case were random and arbitrary. The Court of Appeal deferred to the arbitrator’s labour law expertise and refused to overturn the ruling [Langley (Township) v. Canadian Union of Public Employees, Local 405, 2017 BCCA 1 (CanLII), Jan. 3, 2017].

**MANITOBA**

**LAWS & ANNOUNCEMENTS**

**Pensions**
Jan. 4: The Manitoba Superintendent, Pension Commission issued revised guidelines (Policy Bulletin #4) on unlocking of LIRAs and LIFs.

**Workers’ Compensation**
Feb. 15: That’s the official closing date of the WCB’s review of the current workers’ comp legislation and system. Recommendations are expected in late spring, early summer. The last review took place in 2005.
**NEW BRUNSWICK**

**LAWS & ANNOUNCEMENTS**

**Minimum Wage**
Jan. 12: The government is standing by its promise to raise the minimum wage from $10.65 to $11 per hour on April 1. It will be the third minimum wage increase in the province since December 2014.

**Job Training**
Jan. 1: The province kicked off a new $1 million program to provide free second-language training to unemployed residents 18 or older who are not full-time students and who agree to work with an employment counsellor to develop an Employment Action Plan.

**Workers’ Compensation**
Jan. 18: Not good. After absorbing a 33% workers’ comp rate hike in 2017, New Brunswick employers should expect another “significant” increase in 2018—although WorkSafeNB declined to specify the increase amount.

**CASES**

**No Firing Employee for Unknowing Possession of Marijuana**
A tin foil packet containing a small amount of marijuana fell out of the pocket of an offshore petroleum worker as he was passing through heliport security. Result: He was fired for “possessing” marijuana while on company business in violation of the zero tolerance drugs policy. The arbitrator upheld the termination but the court reversed. To be guilty of possession, a person must not simply possess the substance but intend to do so. The worker claimed he didn’t know he had the marijuana and the arbitrator believed him. Having found that the worker lacked the necessary intent, the arbitrator was unreasonable to uphold firing him for possession. [Communications, Energy and Paperworkers Union (UNIFOR, Local 2121) v. Terra Petroleum worker as he was passing through heliport security. Result: He was fired for “possessing” marijuana while on company business in violation of the zero tolerance drugs policy. The arbitrator upheld the termination but the court reversed. To be guilty of possession, a person must not simply possess the substance but intend to do so. The worker claimed he didn’t know he had the marijuana and the arbitrator believed him. Having found that the worker lacked the necessary intent, the arbitrator was unreasonable to uphold firing him for possession. [Communications, Energy and Paperworkers Union (UNIFOR, Local 2121) v. Terra

**NEWFOUNDLAND & LABRADOR**

**LAWS & ANNOUNCEMENTS**

**Minimum Wage**
Apr. 1: That’s when the Newfoundland minimum wage goes up 25¢ to $10.75 per hour. Another 25¢ increase takes effect on Oct. 1 when the minimum wage will reach $11.00. Meanwhile, the province is considering making future increases automatic tied to the CPI the way many other provinces have.

**Payday Loans**
Jan.: New legislation would regulate payday loans, i.e., short-term loans of $1,500 or less lasting up to 62 days:
- Limits on total cost of borrowing
- Mandatory disclosure by lenders to borrowers
- Borrower’s right to cancel loan during cooling-off period.

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**ONTARIO**

**LAWS & ANNOUNCEMENTS**

**Employment Standards**
Jan. 1: Changes to the ESA Regulation for the automotive industry give employees of organizations with 50 or more employees personal emergency leave of either:
- Up to 7 days per year for illness, injury, medical emergency or urgent matters involving specified family members; or
- Up to 3 days for the death of each specified family member.

**Accessibility**
Jan. 1: Today is the deadline for small businesses (and non-profits) with 1 to 49 employees to provide accommodations and other procedures for the disabled under the Accessibility for Ontarians with Disabilities Act. The law has already been phased in for larger businesses in the private sector.

**Job Training**
Jan. 24: A new $20 million program called the Colleges Applied Research and Development Fund (CARDF) will provide financial assistance to start-ups and other businesses for hiring students for special R&D projects in their field. The idea of the 3-year program: Enable businesses to leverage a valuable source of skilled labour to resolve real-world challenges and students to gain actual field experience.

**NORTHWEST TERRITORIES**

**LAWS & ANNOUNCEMENTS**

**Workers’ Compensation**
Jan. 9: The WSCC launched a pair of new e-Services on its WSCC Connect site:
- Report Payroll for employers to submit and revise annual payroll reports online
- Mine Permits for mining sector employers to submit, revise and cancel permit applications.

**Public Health**
Jan. 16: Under a new 10-year public health care federal funding agreement with the 3 territories, GNT will receive $7.4 million for home care and $6.1 million for mental health programs starting in FY 2017.

**CASHTOWN**

**LAWS & ANNOUNCEMENTS**

**Workers’ Compensation**
Dec. 9: The WHSCC ended hearings on proposed changes allowing the agency to issue tickets (carrying additional fines) against NWT and Nunavut employers for certain OHS violations. We’ll keep you apprised of further developments.

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Pensions
Jan. 12: A proposed new regulation would provide additional portability options for retired members of pension plans who haven’t yet elected to receive their pensions.

Workplace Safety
Jan. 1: Stricter safety rules for use of suspended access equipment at construction sites under the OHS construction project regulation took effect including the requirement to:
- Notify the MOL before putting equipment into service at a project
- Create roof- and site-specific work plans
- Train workers who use or inspect the equipment
- Inspect, test and maintain the equipment.

CASES
Restaurant Owner Pays $15,000 for Racial Slur
A sous-chef of Caribbean descent sued the restaurant where he used to work for racial discrimination. His principle evidence: the restaurant owner called him a “moulinyan,” the Italian word for eggplant, which is frequently used as a racial slur. The Human Rights Tribunal agreed that the sous-chef suffered racial harassment and that race was at least one of the factors for his dismissal and awarded him $15K. But it said there was no proof that race had anything to do with the owner’s failure to pay the sous-chef for all of the hours he worked [Thompson v. Michele’s Italian Ristorante Inc., 2017 HRTO 82 (CanLII), Jan. 19, 2017].

PRINCE EDWARD ISLAND

LAWS & ANNOUNCEMENTS
Internships
Jan. 16: PEI launched a new internship program called SYnC (Supporting Youth in Careers) to provide skills training, business support and guidance for female entrepreneurs looking to start or expand a business in the province. Intern positions will be offered to individuals between ages 15 and 30 with at least some post-secondary education.

Jobs
Jan. 13: The Dept. of Workplace and Advanced Learning plans to open new integrated employment assistance centres across the province to streamline services, increase efficiency of its job support activities and efforts to connect employers with job seekers.

QUÉBEC

LAWS & ANNOUNCEMENTS
QPP
Jan. 1: Here are the QPP rates for 2017.

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<thead>
<tr>
<th>Rate</th>
<th>2017</th>
<th>2016</th>
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</thead>
<tbody>
<tr>
<td>Maximum pensionable earnings</td>
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<td>$54,900</td>
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<tr>
<td>Employer contribution rate</td>
<td>5.400%</td>
<td>5.325%</td>
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<tr>
<td>Employee contribution rate</td>
<td>5.400%</td>
<td>5.325%</td>
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<td>Annual maximum contribution</td>
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<td>$2,737.05</td>
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<tr>
<td>Self-employed maximum</td>
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</table>

QPIP
Jan. 1: QPIP rates are unchanged from 2016 but maximum insurable earnings and contributions are higher:

<table>
<thead>
<tr>
<th>Rate</th>
<th>2017</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum insurable earnings</td>
<td>$72,500</td>
<td>$71,500</td>
</tr>
</tbody>
</table>

YUKON TERRITORY

LAWS & ANNOUNCEMENTS
Mining
Jan. 24: The territorial government has agreed to provide $360,000 worth of financial assistance to the Yukon Chamber of Mines and Klondike Placer Miners’ Association over 3 years to fund training, public awareness and other initiatives to grow the mining industry.

Public Health
Jan. 16: Under a new 10-year $36.1 million public health care federal funding agreement with the 3 territories, Yukon will receive $6.2 million for home care and $5.2 million for mental health programs starting in FY 2017.

For more of these jurisdictions’ laws & announcements and cases, please visit www.hrinsider.ca.
HARASSMENT

Workplace Bullying & Cyberbullying: The Employer’s Liability Risks

An estimated 2 of 5 Canadians suffer from workplace bullying at least once a week. Although public awareness of workplace bullying has grown, digital technology has reinvented the problem and made it harder to deal with. In addition to creating a whole new range of bullying tactics, the internet has democratized bullying. The internet or “cyberbully” can be male or female, management, co-worker or subordinate, and even a customer or member of the public. And because cyberbullying isn’t confined to the 4 corners of the workplace, bullies can target employees from their homes or any remote location.

Regrettably, legal protection against workplace bullying in general and cyberbullying in particular remains spotty at best. Here’s an overview of the current state of regulation in Canada—such as it is.

What Is Bullying?
Bullying is a form of psychologically, and sometimes physically violent conduct designed to intimidate, offend, humiliate, degrade or demean. Rather than a single incident, bullying typically unfolds on a continuing basis.

What Is Cyberbullying?
Cyberbullying means engaging in such behaviour via the internet or other electronic means. Common examples:
- Sending nasty, hostile or threatening emails, texts or other electronic messages directly to the victim;
- Cyberstalking, sexting or repeatedly sending the victim text or email messages to the point of harassment;
- Saying derogatory things about the victim on blogs, chat boards and other social media sites;
- Starting rumors or spreading gossip online;
- Impersonating the victim online, e.g., via creating a fake online profile;
- Stealing the victim’s password and logging into his/her accounts;
- Signing up the victim to instant message marketing lists from pornography sites or junk mailers;
- Posting embarrassing photos or videos of victims without their consent.

Effects of Bullying
Workplace bullying, both conventional and cyber-, causes psychological harms such as low self-esteem, stress-related illnesses, headaches, sleeping and eating disorders, depression, muscle pain and panic attacks, drug abuse, alcoholism and even suicide. Workplace bullying is also a business problem costing employers billions of dollars per year by:
- Driving up absenteeism;
- Reducing productivity;
- Increasing employee turnover;
- Lowering morale; and
- Creating a poisonous workplace environment.

The Use of Social Media Grievance Case
There have been literally dozens of cases finding a duty to prevent workplace bullying. But cases involving cyberbullying are few and far between. Perhaps the most dramatic case on the subject is the recent ground breaking Ontario case of September 2016 upholding a labour grievance against the Toronto Transit Commission (TTC) for failing to stem the torrent of abusive tweets targeting employees on the TTC’s customer service account. The duty to protect employees from workplace bullying and harassment under human rights and OHS laws includes not just the physical facility but the social media sites it operates, the arbitrator found [Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance), (2016) O.L.A.A. No. 267, July 5, 2016].

Cyberbullying Legislation
Only in the past 3 years has there been legislation specifically banning cyberbullying. In 2013, Nova Scotia became the first province to take the plunge. Adopted in response to the notorious case of Rehtaeh Parsons, a teenager who committed suicide after being cyberbullied, gives victims of cyberbullying, including employees, the right to sue for money damages. But while ground breaking, the Nova Scotia Cyber-Safety Act remains the only provincial cyberbullying law on the books.

In 2015, cyberbullying became a crime when a federal law called the Protecting Canadians from Online Crime Act (aka Bill C-13) took effect. The law criminalizes publication or distribution of intimate images online without consent.

Result: Workplace conduct that a few years ago might have been dismissed as a mere prank can now be a ticket to jail.

Example: A financial advisor whose advances were rebuffed by a co-worker refused to take no for an answer, texting her every day until she finally called the police. To get even, the advisor sent an e-mail, purportedly from the co-worker, to 9 other workers. The e-mail degraded the co-worker professionally, sexually and physically. Several years later, he used the same tactic to target an ex-girlfriend by sending a degrading e-mail to her HR director and attaching a naked photo. Result: The advisor was convicted of criminal...

Finding Implied Cyberbullying Obligations under Existing Laws
The new legislation and Social Media Grievance case represent where the law is heading. But unless and until specific laws are adopted, employer liability for workplace bullying and cyberbullying must be implied as an extension of duties under existing laws. There are 4 key laws that can be interpreted as requiring employers to protect employees against bullying and cyberbullying.

1. OHS Laws
A decade ago, people began to recognize that workplace safety meant protecting against not just physical, chemical and mechanical dangers but social hazards like violence. Although not mentioned in the OHS laws, workplace violence duties were implied under the “general duty clause,” i.e., part of the statute requiring employers to manage recognized hazards not specifically addressed in the law. In the late 1990s, provinces began adding specific workplace violence provisions to their OHS laws. Today, only 4 jurisdictions (PEI and the 3 territories) still rely on the general duty clause to impose workplace violence prevention duties on employers.

Violence v. Bullying: The argument can be made that bullying is a form of violence and that the OHS duty to prevent workplace violence includes bullying. While the argument would carry weight for bullying involving physical behaviour, it would be much less persuasive for non-physical behaviour like cyberbullying. This is especially true in Alberta, BC, Manitoba, Newfoundland and Nova Scotia where violence is defined as an act or threat of physical violence. By contrast, federal OHS law defines the term broadly to include acts and threats of both physical and psychological harm. [See the Chart on page x to see where your province stands.]

Harassment v. Bullying: Three provinces require employers to prevent not just workplace violence but also harassment, including: Québec, which has a (Labour Standards) law protecting workers against psychological harassment; Saskatchewan, where employers have an duty to prevent workplace harassment; and Ontario, where Bill 168, requires employers to adopt measures to control both violence and harassment.

Bullying v. Cyberbullying: In all 3 of the above provinces, “harassment” is defined broadly as vexatious conduct inflicting psychological harm. Bullying, both conventional and cyber, would seem to fit this definition. In fact, in Ontario courts and arbitrators have interpreted Bill 168 harassment obligations as covering cyberbullying.


2. Human Rights Laws
Committing or tolerating workplace harassment and bullying may also constitute discrimination resulting in liability under human rights law. Qualification: The behaviour must be based on race, sex, religion, nationality, sexual preference or other personal characteristics protected by the discrimination law, e.g., the homophobic tweets in the Use of Social Media Grievance case noted above. Although it may be unacceptable and illegal under other laws, bullying and harassment directed against all employees and/or groups not protected by the law, e.g., the overweight, doesn’t count as discrimination.

3. Constructive Dismissal
If bullying becomes so bad that the victim feels compelled to quit, he could sue you for “constructive dismissal.” The theory: Committing or allowing cyberbullying creates a poisonous work environment in violation of the employer’s contractual obligation (whether express or implied) to provide employees a professional and psychologically suitable workplace.

The seminal case is a 2001 Ontario ruling involving a constant stream of management criticism against an employee with astellar record. Employers are allowed to criticize employees for unsatisfactory work. But, the Court added, when the employer’s conduct “passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable,” the employer is guilty of constructive dismissal and entitled to damages [Shah v. Xerox Canada Ltd., (2000) CarswellOnt 831; (2000)]. Although the case involved conventional bullying, the same principles would apply equally to cyberbullying.

4. Intentional Infliction of Mental Distress
Victims of cyberbullying can also sue their employers for the intentional infliction of mental distress. To win such a case, the victim must show that:

- The conduct was “outrageous” and went beyond mere assertiveness or aggressiveness;
- The bully deliberately tried to hurt the victim; and
- The victim visibly suffered as a result of the bullying.

Example: A supervisor in Alberta bullied a mentally frail female employee for over 3 years. He humiliated, insulted, manipulated and harassed her at every turn. His language and actions towards the employee grew progressively more violent as she tried to resist his attempts to dominate her. His actions made the employee fear physical harm and, in fact, on one occasion, he did physically hurt her. The employee had a mental breakdown and sued the employer for the intentional infliction of mental distress. The federal court held the employer responsible for the supervisor’s actions and ordered it to pay the employee $35,000 in damages [Boothman v. Canada, (1993) 3 FCR 381, 1993 CanLII 2949 (FC)].
Tool: Workplace Cyberbullying Policy

Introduction: How to Use This Tool
Workplace bullying is an old problem with a new face. In the internet age, bullying has become more pervasive and more virulent—all it requires is a cell phone and a vendetta. Like old-fashioned bullying, workplace cyberbullying inflicts mental distress and harms business in the form of higher absenteeism and diminished productivity. Failing to protect employees from being cyberbullied also exposes your organization to liability risks under OHS, human rights and other laws.

What does it take to stamp out workplace cyberbullying? The starting point is to implement a clear policy. A cyberbullying policy can be combined with your existing workplace bullying policy or implemented as a stand-alone supplement. Although there’s no such thing as one-size-fits all, the Model Policy below is a good starting point for adaptation because it includes the basic elements you need.

Workplace Cyberbullying Policy

PURPOSE: Management of ABC Company is committed to ensuring that all employees are treated with dignity, civility and respect in the workplace. Bullying behaviour is not compatible with this commitment and will not be tolerated in any form. ABC Company has already adopted a general policy banning bullying in the workplace. The purpose of this Policy is to supplement the existing policy by addressing a specific form of bullying called cyberbullying.

WHAT IS CYBERBULLYING: In general, bullying is behaviour that harms, intimidates, offends, degrades or humiliates another person, whether committed by a manager, supervisor or employee, including but not limited to:

- Persistent and excessive criticism of employees or their work without justification;
- Spreading malicious rumours;
- Belittling an employee’s opinions;
- Spying, stalking or otherwise violating an employee’s privacy;
- Tampering with an employee’s desk, workspace or belongings;
- Deliberately excluding or ignoring an employee;
- Deliberately undermining or sabotaging an employee’s work or chances to succeed;
- Verbal abuse, such as yelling, making threats and name-calling; and
- Physical abuse or aggressive behaviour, such as pushing, hitting, spitting, finger pointing or aggressively invading an employee’s space.

Workplace Cyberbullying is a form of bullying that relies on the use of e-mail, the internet and other electronic means of communication. Common examples:

- Sending nasty, hostile or threatening e-mails, texts or other electronic messages directly to the victim;
- Cyberstalking, sexting or repeatedly sending the victim text or email messages to the point of harassment;
- Saying derogatory things about the victim on blogs, chat boards and other social media sites;
- Starting rumours or spreading gossip online;
- Impersonating the victim online, e.g., via creating a fake online profile;
- Stealing the victim’s password and logging into his/her accounts;
- Signing up the victim to instant message marketing lists from pornography sites or junk mailers;
- Posting embarrassing photos or videos of victims without their consent.

WHAT IS NOT BULLYING: Bullying does not include, and this Policy is not designed to prevent managers, supervisors and others in authority to exercise their legitimate management functions, such as by:

- Ordering employees to carry out assignments;
- Constructively criticizing employees for poor performance; and
- Discipline for poor performance, violations of ABC Company policies or other legitimate grounds.

REPORTING CYBERBULLYING: ABC Company has established the following procedures for employees to use to report incidents of workplace cyberbullying directed against them or that they witness. [Describe your reporting procedures]. No employee will suffer reprisal in any form for reporting cyberbullying.

INVESTIGATION & RESOLUTION OF COMPLAINTS: ABC Company has established the following procedures for investigating and resolving complaints about cyberbullying. [Describe your complaint resolution procedures.]

DISCIPLINE FOR INFRACTIONS: ABC Company follows a zero tolerance policy with regard to workplace cyberbullying. So any violations that occur will result in disciplinary action, up to and including termination, at ABC Company’s discretion.
LAWSCAPE
The Law of Workplace Bullying & Cyberbullying

NOTES

- Federal OHS law imposes employer duty to prevent act/threat of physical and psychological harm
- In QC, the duty to prevent psychological harassment is part of Labour Standards Act
- All jurisdictions ban workplace harassment and bullying based on race, sex, religion and other personal characteristics protected by human rights laws
- Federal Bill C-13 makes acts of cyberbullying a crime
- Nova Scotia Cyber-Safety Act gives cyberbullying victims right to sue for money damages

Employer OHS duty to prevent act/threat of psychological and physical harm

Employer OHS duty to prevent act/threat of physical harm only

OHS duty to prevent act/threat of physical and psychological harm may be implied under general duty clause
HR Insider Webinar: How to Get Work Permits

**Date:** March 15, 2017  **Time:** 8:30AM PT – 9:30AM PT (+Q&A)

**Registration:** [https://attendee.gotowebinar.com/register/4100983037217487618](https://attendee.gotowebinar.com/register/4100983037217487618)

**Speaker:** Benjamin Kranc, Certified by the Law Society of Upper Canada as a Specialist in Immigration Law.

This is the first in a two-part series about getting foreign workers to Canada. The first session will focus on getting foreign workers to Canada; the second will focus on (ever-stricter) ongoing compliance requirements.

Employers often need foreign talent, whether from their own foreign affiliates, or from outside their organization. This first of two webinars will provide practical advice concerning the bringing/transferring of temporary foreign workers to Canada. Attendees will leave with an understanding of the ‘big picture’ flow of the immigration system, as well as the nuanced issues within the system that can make or break an application – along with strategies on how to overcome the obstacles.

Specific topics will include:

- ESDC/Service Canada Labour Market Impact Assessment (LMIA) procedures
- Intra-company transfers
- NAFTA, GATS and other treaty-based professional provisions
- The strategies for avoiding an LMIA
- Making sure that things go as planned upon entry to Canada by the foreign worker

**About the Speaker**

Benjamin A. Kranc is senior principal of the firm, and has many years of experience assisting clients in connection with Canadian immigration and business issues. Ben is certified by the Law Society of Upper Canada as a Specialist in Immigration Law, and is one of only a select few to be chosen by ‘Who’s Who Legal’ to be a foremost practitioner in his field. He has spoken at numerous conferences, seminars, and information sessions – both for professional organizations and private groups – about issues in Canadian immigration law and has taught immigration law at Seneca College in Toronto.

In addition to his extensive experience as a Canadian immigration lawyer, Ben has further extensive experience and insight in the operations of a global immigration service provider, and the needs of its clients. Ben acted as a global director for Emigra Group, one of the world’s largest corporate immigration service providers, as well as president of Emigra Canada, the Canadian arm of the organization. Given his background, Mr. Kranc has experience in both corporate and personal immigration matters, as well as an understanding of clients’ needs.

Benjamin Kranc can be reached directly at bkranc@kranclaw.com.

Find more webinars at hrinsider.ca/upcoming-live-webinars