

EMPLOYERS' ALERT

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WHAT'S NEW at RUBIN THOMLINSON LLP

Janice Rubin spoke at the OBA's Corporate Counsel session entitled, "Love and Marriage? An Employment Law Refresher" on February 3. Janice discussed employee privacy and what medical information employers are able to access concerning their employees.

Another session of **Conducting Internal Workplace Investigations** took place on February 11 and 12. If you are interested in attending our next session on May 4 and 5 please contact us at (416) 847-1814 or seminars@rt-law.ca to register.

Janice was also a guest on CBC's The Current with Anna Maria Tremonti on February 16. Janice discussed employee terminations.

Sharaf Sultan spoke to the University of Toronto's Master's of Industrial Relations class on February 25. Sharaf discussed the challenges that employers and employees face during the current recessionary times.

Chris Thomlinson spoke at a webinar entitled, "Is Your Organization Ready for the Next Generation of People Performance", which was hosted by n-gen People Performance on February 26. Chris discussed the legal challenges that employers and employees face in today's multigenerational workplace.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Ruben Thomlinson LLP. This has been sent to you courtesy of Ruben Thomlinson LLP.

Given the current economic downturn, many employers are looking for ways to adjust staffing levels. On the one hand, they wish to reduce head count and wage costs. On the other hand, they do not want to trigger their termination obligations, and they wish to leave open the possibility of staffing up, once the recession is over. Is there a lawful way of doing this?

Temporary Lay-offs: A useful tool in a time of recession?

In some limited cases, the answer is yes. Under the Employment Standards Act, there is a provision for temporarily laying off an employee. These lay-offs can be of two different durations. The first is a lay-off of not more than 13 weeks in any period of 20 consecutive weeks. The second is a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks. In this longer lay-off, to be consistent with the ESA, employers must continue to provide their share of employee benefits (i.e. medical or drug insurance) and contributions to any retirement pension or group insurance plan if such exists. In addition, the employer must ensure that it sets a recall date, and actually recalls the employee within the time frame described above.

These recall dates can be extended, provided that they comply with the time frames set out above. If the lay-off does not have a recall date – typically evidenced by the employer filling out the Record of Employment with "unknown" in the recall box, the lay-off will be considered to be a

"sham" and the employee will have been terminated, and entitled to termination and severance pay (if applicable) under the ESA. Conversely, if the employee is recalled, and does not return to work, he or she has resigned, and is not entitled to any payments under the ESA.

We are often asked by our employer clients if they follow the technical requirements of the ESA, can they lay-off any employee without triggering any legal liability? The answer to this question is no. While an employer may have complied with the ESA and created a valid statutory lay-off, the fact is that if the possibility of a lay-off is not a term and condition of the employee's employment, the lay-off may trigger a constructive dismissal. In this case, the employee will be entitled to pay in lieu of notice. The easiest way for an employer to show that there is such a term, is through the existence of a written employment contract that says that it may lay-off the employee in certain circumstances. Absent that, a court would look for the employer's general practice – and whether there have been lay-offs in the past – as well as what occurs in the employer's industry.

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What does this mean for employers?

Adhering to the requirements

To create a valid lay-off, employers must adhere to the technical requirement of the ESA. Because of the strict timing requirements, we recommend that there be at least one person in the organization who has the various dates diarized, so that sloppy administration does not inadvertently trigger an employee termination. In addition, special care needs to be taken in filling out employee Records of Employment for the same reason.

Planning ahead with benefits

Employers should realistically gage their staffing requirements. If there is even the remotest possibility of a 13 week lay-off being extended, then the employee's benefits should be continued. In most cases, this is a

minimal cost, and it provides the employer with additional flexibility in terms of the length of the lay-off. In addition, while it is never pleasant to be told that your employment income will be discontinued for a period of time, the extension of benefits over the lay-off period softens the blow to employees, and provides them with support in addition to any employment insurance benefits they might receive.

Right to lay-off employees

If you operate in an environment where you anticipate the need to lay-off employees periodically, then an explicit term should be included in your employment contracts and policies. This could be helpful to employers who experience large seasonal variations in their business, or employers who engage in project work that sees them ramping up staffing, and then once the project is over, ramping down. ●

From Our Desk

Work-Sharing

We want to highlight the federal "Work-Sharing" program, which may actually help employers deal with a downturn in business, and assist them in avoiding laying off employees. The program allows employers to reduce employee shifts while allowing employees to qualify for Employment Insurance benefits for the days they are not working. The employer must demonstrate a sufficient need and a recovery plan to return to normal hours of employment within a 26 week period (and in some circumstances within a 38 week period). Both the employer and employees concerned must agree to participate for the employer to be eligible for the program. The employer must also demonstrate that the reduced work week is not more than 3 days and not less than one day per week.

More information on the program can be found at
http://www1.servicecanada.gc.ca/eng/epb/sid/cia/grants/ws/desc_ws.shtml

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca.

UPCOMING EVENTS

April 2

James Heaney will be speaking at the Canadian Institute's 9th Annual "Winning HR practices of the Best Employers in Canada" on April 2. James will be discussing best practices for accommodating employees.

April 28

Janice Rubin will be speaking at the 3rd Annual Employment Law conference entitled, "Proactively Managing Legal Risk in Challenging Times", which is being hosted by Osgoode Hall on April 28. Janice will be discussing the do's and don'ts of giving references.

May 8

Janice Rubin will be speaking at the Spring Symposium 2009, which is being hosted by the American College of Trial Lawyers and The Advocates' Society. Janice will be discussing how lawyers who are assisting the complainant or respondent in an investigation can avoid making the situation worse.

May 22

Janice Rubin will be speaking at the "Managing Workplace Violence, Bullying & Harassment" conference, which is being hosted by The Canadian Institute on May 22. Janice will be discussing case law on the standards of bullying and knowing when to investigate.

Webinars Now Available!

The HRPAs has a collection of webinars that are now available online. We have assisted the HRPAs in producing several of these webinars for human resources professionals. They include, "When Overworked Means Overtime: Staying Out of Legal Trouble" and "Personal Harassment: What it is and How Do You Respond". Feel free to check them out by visiting the HRPAs's website at www.hrpa.ca.