In the know

WILLIAMS HR LAW
LEGAL EXPERTISE AT WORK

Issue No. 9 – *February 2014*

The Year that was and a look ahead: 11 trends and developments that shaped employment law and HR policy design in 2013—and their impact on the year ahead and beyond

The past year delivered an array of developments in labour and employment law that are having a direct impact on the talent-management strategies and tactics deployed by business owners, managers and human resource professionals across Canada. From rulings that redefined employers' duty to accommodate employees' personal and professional needs, to the Supreme Court of Canada's decision to affirm the enforceability of commercial restrictive covenants, 2013 delivered its fair share of transformative judicial and legislative changes—many of which will contribute to the ongoing evolution of Canadian workplaces. That's not to mention the continuing shift in workplace norms—think everything from continuing adjustments employers are making to accommodate and integrate transformative new technologies, along with generational changes that are impacting the nature of employer-employee relations and engagement programs.

With this in mind, we are proud to issue our first edition of *In The Know* for 2014. In this issue, we provide an overview of the Top 11 developments in labour and employment law and legislation that will have the most profound effect on your workplace.

Want to discuss how these changes are affecting your workplace? **Contact us at** info@williamshrlaw.com

In this issue

Williams HR Law Professional Corporation
Labour & Employment Lawyers for Employers
11 Allstate Parkway Suite 100
Markham, Ontario L3R 9T8
Tel: 905.205.0496 Fax: 905.418.0147
www.williamshrlaw.com

Don't forget to subscribe to our, follow-us on, like us on and connect with us on.

1 How an employee's child or eldercare issue may become your problem

In *A. G. Canada v. Johnstone*, 2013 FC 113, Ms. Johnstone and her husband were both full-time border services officers working on rotating shifts at Pearson International Airport for the Canadian Border Services Agency (CBSA). After the birth of their last child, Ms. Johnstone asked the CBSA to provide her with full-time day shifts to accommodate her childcare needs. However, the CBSA had an unwritten policy restricting day shift requests to part-time employees. Ms. Johnstone was offered part-time work, but she argued that transferring would negatively impact her income, benefits and pension eligibility.

Ms. Johnstone filed a complaint with the Canadian Human Rights Tribunal (CHRT) alleging that the decision of the CBSA not to accommodate her childcare responsibilities was a breach of the *Canadian Human Rights Act* (the "Act") on the basis of family status. The CHRT found that "family status" was broad enough to include childcare obligations and that the CBSA's policy and conduct was discriminatory on the basis of family status. It specifically noted that the CBSA had no written policy, made no individual assessment of Ms. Johnstone's needs and viewed family obligations as a personal choice. On appeal, the Federal Court agreed with the CHRT that the CBSA had discriminated against Ms. Johnstone by failing to make efforts to accommodate her request, and applying its unwritten policy to not provide day shifts to full-time employees.

Significance to Employers:

Although this case was brought under the Act that only applies to federally-regulated employers, this decision represents the leading case on family status accommodation, which is a rapidly growing area of workplace human rights law. The significant point for employers is that it does not mean any employee with childcare needs can insist on accommodation. Instead, this decision creates a threshold requiring employees to first look for their own solutions to family care issues before seeking accommodation from their employer.

This case is also a good reminder for all employers to review written accommodation policies and consider how requests relating to family status are handled. When responding to an accommodation request, it is important to consider the individual circumstances of each case. The onus may be shifting to employers to accommodate employees where their family care issues rise to difficult or impractical levels. Having a policy of good faith and individualized accommodation combined with consistent documentation will go a long way to help assist with such requests—and with defending against complaints.

*Note: a recent case from the Human Rights Tribunal of Ontario, *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590, found that employers have a similar legal obligation to accommodate an employee who has eldercare responsibilities.

2 Failure to accommodate can be costly: HRTO orders reinstatement with back-pay after 10 years

In *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440, the Human Rights Tribunal of Ontario (HRTO) ordered the school board to reinstate the applicant and provide her with back-pay and benefits, which amounted to more than $400,000. The applicant, Ms. Fair, had been absent from the workplace for almost 3 years. Ms. Fair had been employed with the school board for approximately 15 years when she developed an anxiety disorder in 2003 relating to her role in supervising the removal of hazardous materials. After a short leave of absence, Ms. Fair was assessed as capable of participating in gainful employment. However, the HRTO found that the school board failed to investigate accommodation options for Ms. Fair's disability and did not offer her available and appropriate work before terminating her employment in 2004. Ms. Fair was also awarded $30,000 in general damages for injury to dignity, feelings and self-respect. Regarding her request to be reinstated 10 years after being dismissed, the HRTO noted that the purpose of the Human Rights Code is to make a discriminated employee "whole"—that is, to put the employee back into a situation as if the discrimination never occurred. Based on this principle, reinstatement was the most effective way.

Significance to Employers:

Reinstatement is not frequently a remedy requested by the employee. This decision confirms that reinstatement remains a viable option for a terminated employee even if he or she was terminated many years ago. The HRTO noted that reinstatement was also an appropriate remedy given that the employee failed to find alternative, full-time employment. Thus, employers should be wary that the failure to accommodate does not only mean facing monetary damages, but potentially the return of a terminated employee.

3 The final word on alcohol and drug testing in the workplace

The Supreme Court of Canada issued its final decision in *CEP v. Irving Pulp & Paper, Limited*, 2013 SCC 34 regarding the legality of random alcohol and drug testing in the workplace. This decision prohibits an employer from unilaterally imposing policies on random drug and alcohol testing unless the employer can prove its workplace is safety sensitive and other factors, including an employee with an overt substance abuse problem. In addition, the Court confirmed that testing for alcohol and drug use can occur in a dangerous unionized workplace after the occurrence of a workplace accident or significant incident involving an employee returning to work following a leave of absence for substance abuse.

Significance to Employers:

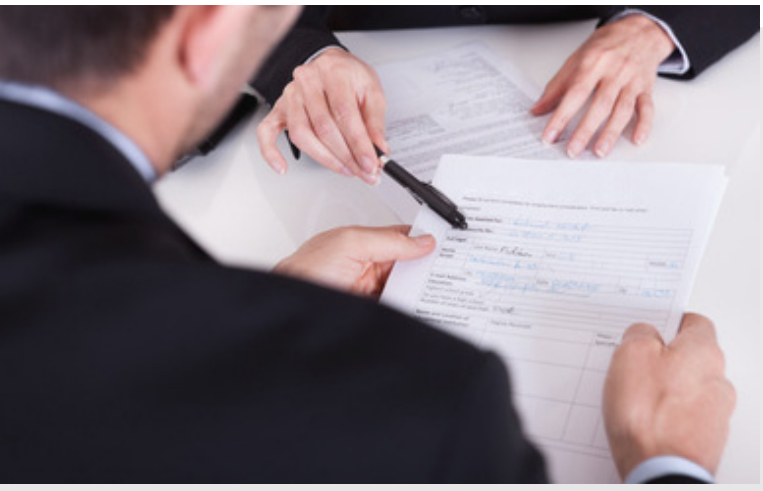
This decision reinforces the extreme difficulties employers face in justifying random drug and alcohol testing. The Court frowned upon the unilateral imposition of such policies; thus, where possible, companies operating in a unionized environment should try to negotiate an alcohol and drug policy with the union. The Court did provide guidance on when testing may be appropriate and these guidelines should be reviewed by both employers of union and non-unionized workplaces. As always, policies don't exist in a vacuum and employers should always be mindful about potential privacy and human rights

issues that may arise if testing is not in line with the most recent legal requirements.

4 Pension Benefits Not Deductible from Dismissal Damages

In *IBM Canada Limited v. Waterman*, 2013 SCC 70, Mr. Waterman was 65 years old and had been working for IBM for 42 years when he was dismissed without cause and provided with only 2 months' notice, in addition to his fully vested pension benefits. Given his age and length of service, he sued IBM for wrongful dismissal. The British Columbia Supreme Court awarded him 20 months' notice and did not deduct the pension benefits paid to him from the damages awarded. The British Columbia Court of Appeal agreed with the lower court's treatment of pension benefits.

The Supreme Court of Canada upheld the Court of Appeal's decision that pension benefits are distinct from disability benefits and should generally not be deducted from damages for wrongful dismissal. Unlike disability benefits, which are a form of salary replacement, pension benefits are a type of deferred compensation. Moreover, individuals can receive pension benefits and salary at the same time. Although Mr. Waterman's employment contract was silent on pension deductibility, this did not mean that pension benefits must be deducted. The Court also concluded that for public policy reasons, pension benefits should not be deductible, thereby eliminating the economic incentive to dismiss pensionable employees first instead of other employees.



Significance to Employers:

It is important to note that even though the employer made all of the contributions to the pension plan, the Court recognized that the employee earned these benefits through years of service and it was never the intention of the parties to rely on pension benefits to offset termination payments. One upside is that the Court has suggested parties can contractually agree to have pension benefits deducted from damages for wrongful dismissal. This may be a strategy employers want to consider when entering into new employment agreements with pensionable employees.

5 Supreme Court affirms that commercial restrictive covenants are enforceable

In *Payette v. Guay Inc.*, 2013 SCC 45, a rare positive decision for employers, the Supreme Court of Canada upheld 5-year non-competition and non-solicitation provisions in an agreement of sale for a crane rental business. This decision was on appeal from the Quebec Court of Appeal, but it is still an important decision for common law jurisdictions where, in the employment context, courts have found restrictive

covenants unenforceable from the outset, unless they can be proven to be reasonable. have found restrictive covenants unenforceable from the outset, unless they can be proven to be reasonable.

Payette and his partner sold their business to Guay Inc., and agreed to continue working for 6 months. The Purchase and Sale Agreement provided that the partners would not compete against Guay Inc., or solicit its customers for 5 years from the end of their employment. Payette's employment was ultimately terminated, and shortly thereafter, he accepted employment with a direct competitor. The central issue in this case was the enforceability of the restrictive covenants contained in the Purchase and Sale Agreement. In upholding the restrictions, the Court found a distinction with respect to the lawfulness of restrictive covenants in certain contexts. The Court concluded that in the commercial context of selling a business, a restrictive covenant is generally enforceable, unless it is found to be unreasonable. However, in the employment context, a restrictive covenant is prima facie unenforceable, unless it can be proven to be reasonable. This case involved both commercial and employment contexts. In the end, the Court found that Payette agreed to the covenants in the context of the sale of the business, and the Court applied the less rigorous standard of the commercial context. Ultimately, the Court found the restrictions reasonable.

The Court also commented on the reasonableness of the non-solicitation clause that had no territorial restriction. Of particular note to employers, the Court clarified that geographic territory may be important in determining the reasonableness of a non-solicitation clause, but the lack of a defined territory will not automatically make a non-solicitation clause unreasonable. This is because our modern economy relies heavily on new technologies where customers are located world-wide, making territorial boundaries obsolete.

Significance to Employers:

In this case, the Court has gone a long way to protect the legitimate business investment of the employer company. Any company involved in a purchase and sale should ensure that all restrictive covenants for key employees of the purchased enterprise are incorporated into the sale agreement, rather than placed in separate employment agreements. They should also ensure that the purpose of any covenants is clear and reasonable. Although this case involved a sale of a business, the Court took the opportunity to state that non-competion and non-solicitation provisions will continue to be subject to judicial scrutiny in the employment context, and there is a continuing need to ensure those provisions are not overly broad.

6 *Companies can be fined into bankruptcy for corporate criminal negligence*

R. v. Metron Construction Corporation, 2012 ONSC 506 ("Metron") is the most recent decision dealing with corporate criminal negligence since the passing of Bill C-45 Occupational Health and Safety amendments to the Criminal Code (the "Code"). In this case, the Ontario Court of Appeal nearly quadrupled the fine against Metron from $200,000 to $750,000 (plus a 15% victim surcharge). The facts of the case are well-known and tragic. On Christmas Eve of 2009, 4 workers died and

another worker was seriously injured when the suspended scaffolding of the high-rise building collapsed. The suspended scaffolding did not have proper fall protection.

There is little existing case law in the area of corporate criminal liability making this a very relevant decision for employers. The Court found that criminal offences will be treated differently than regulatory health and safety violations and will likely attract larger fines or sentences due to the "higher degree of moral blameworthiness and gravity" associated with a criminal conviction. The Court also confirmed that Metron's site supervisor was a "representative" and "senior officer" under the Code. Therefore, his behaviour, which included smoking marijuana with the workers before the fall, not having enough lifelines available, and allowing 6 men on a scaffolding built for 2 workers, could attract corporate liability for criminal negligence.

Significance to Employers:

The site supervisor did not have a high position within Metron, and in fact, had his own construction company. However, the Court found that the intent of the Bill C-45 amendments was to place responsibility on the corporation for the supervisor's conduct. It is also important to note that sentences imposed on corporations for criminal negligence will not distinguish between the actions of low-level representatives and the president of the company. This is significant because the misconduct of individuals with localized responsibilities, such as branch, store, plant and area managers, could lead to liability of their company.

Although a corporation's ability to pay the fine may be considered in certain circumstances, it will not be determinative, and in some cases, a fine may result in a company's bankruptcy. Even though safety records may be of limited assistance when defending against charges of criminal negligence, companies should be diligent in keeping safety records because strong documentation indicating health and safety compliance could affect whether to lay charges for a workplace accident.

7 *$450,000 in punitive damages awarded against employer for malicious prosecution*

The Ontario Court of Appeal in *Pate Estate v. Harvey Township*, 2013 ONCA 669 reduced the punitive damages awarded at trial from $550,000 to $450,000. These punitive damages were awarded to compensate the employee for being dismissed for cause based on suspicion of fraud. After Mr. Pate was dismissed, the township pressured the police to lay criminal charges, of which he was ultimately acquitted. Mr. Pate then successfully sued the township for wrongful dismissal, malicious prosecution and reputational injuries. Although his award was slightly reduced on appeal, the Court found some of the misconduct by the township troubling. Critical to a finding of malicious prosecution was the failure to disclose exculpatory evidence to the police.

Significance to Employers:

Although this was not the typical wrongful dismissal case, and the award was reduced on appeal, the damages award of $450,000 is still significant. The award underscores that the damages can be significant where an employee is mistreated during termination, and the employer fails to conduct a proper investigation and engages in harsh, malicious and reprehensive conduct.

8 Ontario Court of Appeal overturns 'absurd' interpretation of OHSA reporting obligations

Last February, the Ontario Court of Appeal released its decision in *Blue Mountain v. Ontario (The Ministry of Labour)*, 2013 ONCA 75 overturning the rulings of the Ontario Divisional Court and the Ontario Labour Relations Board (OLRB) that Blue Mountain Resort had failed to report the death of a guest pursuant to their obligations under section 51(1) of the *Occupational Health and Safety Act* ("OHSA"). Section 51(1) requires an employer to report to the Ministry of Labour (MOL) any fatality or "critical injury" which occurs to a person at a workplace.

In this case, a guest of the resort drowned in an unsupervised swimming pool on Christmas Eve of 2007. The resort did not report the fatality on the basis that the accident did not involve a worker and had not occurred in a "workplace," given that no employees were present at the time of the accident. When the drowning came to the attention of a MOL inspector in March of 2008, the inspector issued a compliance order directing the resort to report the drowning pursuant to section 51(1).

The resort appealed the decision to the OLRB and then to the Ontario Divisional Court. The Divisional Court held that hazards to non-workers could also affect workers, and therefore, it was within the powers of the MOL to investigate this particular accident. The Court of Appeal overturned the interpretation of the reporting requirements by the OLRB and the Divisional Court stating that such an interpretation would make virtually every place a "workplace" because a worker may, at some time, be at that place.

Significance to Employers:

This is a welcome decision for employers as it provides reasonable limitations on the reporting obligations under section 51(1) of the OHSA. A new challenge for employers will be determining whether a fatality or critical injury can be said to have a reasonable nexus to worker safety in the workplace, as the Court provided no guidance in making this determination. In any case of a critical injury or fatality in the workplace, employers should consult legal counsel to determine a proper course of action.

9 New mandatory WSIB coverage now extends to business owners

After years of exemptions, the Workplace Safety Insurance Board (WSIB) recently took steps to extend mandatory WSIB coverage to the construction industry. The move was designed to level the playing field in a highly-competitive industry, as well as improve the health and safety standards for all construction workers.

The days of exemptions from WSIB coverage are gone for certain employee-less independent contractors who work on jobsites, as well as construction business owners. As of January 1, 2013, a new mandatory coverage system for independent contractors, sole proprietors, certain business partners and executive officers working

in construction was introduced. This change requires those affected to secure and pay for WSIB coverage. As well, principals and executives who hire contractors must ensure a WSIB clearance certificate is provided before allowing them to work on a jobsite. Not only is certification mandatory, the certificate must also be valid for the entire length of providing services. For construction companies, this introduces a new operational requirement. Specifically, they must put systems in place to monitor the expiry dates of certificates and ensure new certificates are put on file before they expire. They must also ensure these certificates are kept on file for at least 3 years after the date on which they are obtained in the event the WSIB or its representatives conduct an inspection.

Significance to Employers:

The costs of non-compliance with the *Workplace Safety and Insurance Act* can be hefty and provide a good incentive to employers to minimize their exposure.

Individual violators can be fined up to $25,000 and/or imprisoned for 6 months, while corporations can be fined up to $100,000.

Construction firms are well advised to ensure their policies for obtaining WSIB coverage and clearance certificates are in place and working.

10 *The bar is set: Ontario court awards damages under section 46.1 of the Human Rights Code*

In September, an employee in *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799 became the first person to be awarded human rights damages by the Ontario Superior Court in a wrongful dismissal action. After being employed with Solis Mexican Foods Inc. for 16 months, Ms. Wilson was terminated and provided 2 weeks' pay in lieu of notice. She immediately commenced legal action alleging wrongful dismissal and discrimination under the Human Rights Code ("Code"). She had ongoing back problems that she believed were, at least in part, the reason behind her termination.

The Court found in favour of the employee with respect to both allegations. She was awarded 3 months' notice and $20,000 for injury to dignity, feelings and self-respect under section 46.1 of the Code. The Court awarded the damages under section 46.1 citing the serious nature of the employer's discriminatory treatment of Ms. Wilson's disability. It was the opinion of the Court that the employer orchestrated the termination of Ms. Wilson by timing her exit from with a company restructuring. There had been no efforts to accommodate her back problems and "complete recovery" was made a condition for her return to work. Moreover, the Court noted that there was no concern with Ms. Wilson's cultural or operational fit with the company until she reported her back injury to her employer.

Significance to Employers:

Under the proposed legislation, some of the more significant changes would include a requirement that employers provide employees with bilingual information prepared by the MOL outlining an employees' legal entitlements under the ESA. The same information will be available in any of the 23 languages in which the MOL operates. Bill 146 will need to pass through a second and third reading and will likely undergo further amendments before, and if, it is ultimately enacted into law.

11 *Proposed legislation seeks to introduce increased protection for vulnerable workers*

In December, proposed legislation was introduced in the Ontario Legislature that, if passed, would make significant changes to Ontario employment law.

The "Stronger Workplaces for a Stronger Economy Act", 2013, also known as Bill 146 (the "Bill"), was introduced by the Ministry of Labour (MOL) as part of the provincial government's effort to provide increased protection in the workplace. The Bill primarily targets those groups that have traditionally held limited workplace rights or are seen as particularly vulnerable in the employment relationship. Some of the groups afforded additional protections include unpaid interns/students/ trainees, employees making a claim under the Employment Standards Act ("ESA"), foreign nationals, temporary help agency employees and unionized construction industry employees.

Significance to Employers

Under the proposed legislation, some of the more significant changes would include a requirement that employers provide employees with bilingual information prepared by the MOL outlining an employees' legal entitlements under the ESA. The same information will be available in any of the 23 languages in which the MOL operates. Bill 146 will need to pass through a second and third reading and will likely undergo further amendments before, and if, it is ultimately enacted into law.

TOP 11 LABOUR AND EMPLOYMENT LAW DEVELOPMENTS for 2014

Looking Forward to 2014

Mandatory Compliance with the *Accessibility for Ontarians with Disabilities Act* ("AODA") for employers with 50+ employees under the "Integrated Accessibility Standard" is required as of January 1, 2014

Large-sector employers now join public sector employers in having to develop and implement an accessibility policy and a multi-year accessibility plan as required by the AODA. Small, private-sector employers (less than 50 employees) have another year to develop and implement the policies, and are not required to prepare the accessibility plan.

Supervisors and workers in Ontario workplaces must complete a basic "safety awareness" training program by July 1, 2014

As of July 1, 2014, Ontario employers will be required to ensure that their supervisors and workers complete a basic safety awareness training program under the Occupational Health and Safety Act ("OHSA"). O.Reg. 297/13 mandates that workers complete the program as soon as possible, while supervisors are required to undergo the training within 1 week of starting as a supervisor. Employers must also keep records of the training.

The mandatory training has a number of focus areas, including: the duties and rights of workers, supervisors and employers under the OHSA; the roles of health and safety representatives and joint health and safety committees, as well as the Ministry of Labour and Workplace Safety and Insurance Board in identifying and responding to workplace hazards; the requirements of WHMIS regulations; and occupational illness. Supervisor training must also include: recognizing, assessing and controlling workplace hazards; evaluating controls on workplace safety; and sources of information on occupational health and safety. However, if workers have previously completed a training program—and can provide proof—they will not have to retake it. In addition, supervisors who have completed a basic training program for supervisors prior to the regulation coming into effect will not be required to complete the training program.

What's New at WHRL

Please join us in welcoming Pamela Chan!

Pam is a lawyer with Williams HR Law, where she practices in all areas of human rights, labour, and employment law. Prior to joining WHRL, Pam practiced as in-house counsel with a multinational manufacturing corporation. In this role, she provided management with practical solutions designed to solve both their legal and business needs. Pam will continue advising and representing employers in all areas of labour and employment law.

An innovative and proactive approach to labour and employment law.

At Williams HR Law, we're focused on helping you build a better workplace by delivering practical, customized and sustainable legal solutions designed to meet your everyday HR needs.

Our Proactive Approach Sets Us Apart:

Client-service is paramount. We're always available to provide timely advice to our clients. Rely on us to deliver service that not only resolves the legal issues you face today, but anticipates and advises on the HR policy improvements your organization can make to avoid legal trouble tomorrow.

With Williams HR Law, You're In The Know:

Knowledge is power. As a Williams HR Law client, we'll keep you up to date on the recent developments in labour and employment law, while providing the insights your organization needs to implement proactive policies and make informed business decisions.

We Listen Before We Speak:

No two clients are the same. Effective legal advice means understanding and addressing the unique needs of your organization. We take the time to listen to your challenges and business priorities, then provide a tailored legal solution that helps support organization-wide success.

We Offer Practical Solutions:

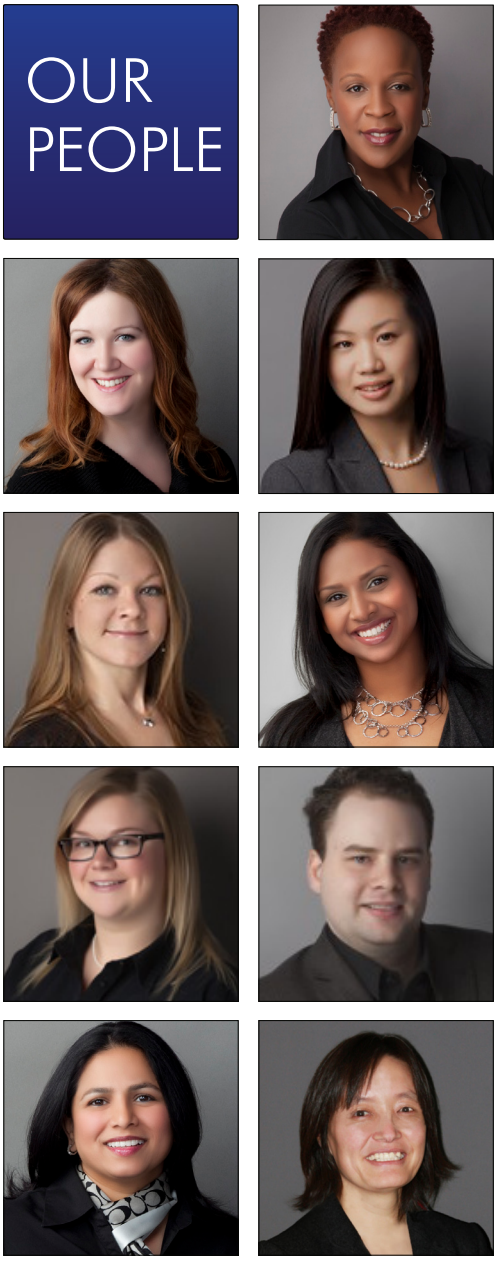
An ounce of prevention is worth a ton of litigation. We offer cutting-edge legal services and HR consulting designed to defuse workplace issues before they escalate. We highlight relevant options and work with you to achieve resolutions that make sense for your organization.

We See The Big Picture:

Going beyond the law. We're dedicated to delivering effective human resources strategy and tactics that give you the tools to design and implement smart policies, train personnel and improve workforce engagement and morale.

We Love What We Do:

Passion breeds success. Practicing HR law isn't just our job, it's our passion. We enjoy providing industry-leading service and delivering the results employers need to build highly-engaged workplaces and boost their bottom line.



General Areas of Practice:

- employment contracts
- workplace policies
- performance management advice
- employment standards compliance
- workplace investigations
- human rights
- workplace safety and insurance
- health and safety
- privacy compliance
- legal compliance audits
- WSIB compliance audit
- labour relations
- grievance arbitration
- pre-termination advice and strategy
- wrongful dismissal actions
- management/supervisor training
- workplace restoration

LAUNCHING MARCH 17, 2014

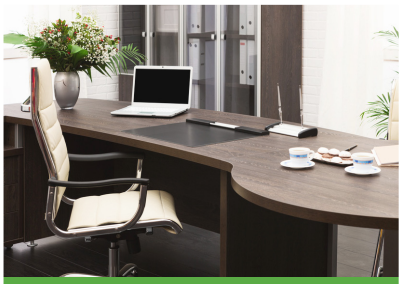
DEVELOP AT WHRC

SPRING SERIES

The Develop at WHRC Spring Series is a multi-faceted learning experience designed to enhance and promote compliance and HR best practices in organizations in four key areas:

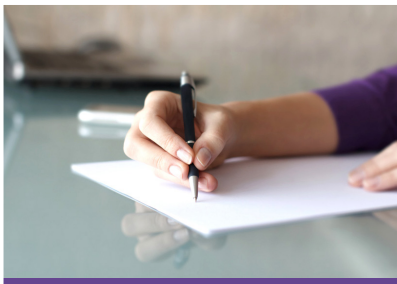
WILLIAMS HR CONSULTING

HR LAW COMPLIANCE 2014



ATTENDANCE AND DISABILITY MANAGEMENT

WORKPLACE INVESTIGATIONS



PERFORMANCE MANAGEMENT AND TERMINATIONS

Each development series includes four key elements intended to build awareness, knowledge and allows participants to work on the real issues affecting their workplaces.

Each Series Includes:

- Access to topical **Articles**;
- Interactive 1 ½ hour **Live Webinar**;
- Company **Assessment** and **Reporting** as well as a **Benchmarking Report** on the trends of other organizations; and
- Experiential 3 ½ hour **Workshop**.

Who Should Attend?

HR Practitioners*, Business Leaders, CFO's/Controllers, People Managers, Health and Safety and Disability Management Practitioners, In-House Counsel

Why Attend?

It is often the case that organizations act out of a sense of urgency after a complaint is filed or a Ministry of Labour Inspector shows up at your workplace. At that point, HR Practitioners and business leaders find themselves reacting and managing a situation—and often dealing with fines, costly out-of-court settlements or even expensive litigation.

- Builds awareness of HR law compliance risks and exposures in your organization
- Promotes strategies to manage your complex attendance and disability management cases
- Provides an approach to conduct effective workplace investigations to minimize exposures and preserve culture and engagement
- Encourages best practices to manage your performance and termination-related issues

* The Develop at WHRC series may qualify as Continuing Professional Development (CPD) for your CHRP recertification (4.5 hours per series).

Register today by visiting us at williamshrconsulting.ca/DevelopatWHRC or contact us directly by emailing DevelopatWHRC@williamshrconsulting.ca or calling 905.205.0422