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U.S. EMPLOYMENT AGREEMENT RULED INAPPLICABLE IN B.C.

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When an employee has two employers, one American and one Canadian, the language of an employment agreement that deals with termination entitlements will only take you so far. A recent case decided by the British Columbia Court of Appeal, *Stanley v. Advertising Directory Solutions* [2012 BCCA 350], found that an employee of a US company who was working for a Canadian subsidiary is entitled to notice upon the termination according to Canadian law. This despite a written agreement that indicated otherwise.

The court ruled that an agreement with a US parent company will not permit a Canadian company, which is also the person's employer, to avoid its obligation to provide reasonable notice or pay in lieu of notice of termination.

The US-based employee, Susan Stanley, was a Canadian citizen. She was employed by Verizon Communications Inc. in its Texas office. She was offered a promotion to a position in Vancouver for Verizon's Canadian subsidiary, Dominion Directory Company Ltd. At the time of the transfer from the US to Canada, Susan agreed to the terms of a letter written on Verizon letterhead. It said that while on assignment in Canada, she would remain an employee of Verizon. Her employment would be "at will" (that is, there would be no obligation on the employer to provide notice or pay in lieu of notice for a dismissal without cause).

Once in Canada and on Dominion's payroll, Susan worked hard to further its business interests. She reported to Dominion's Canada-based president. A few years into Susan's tenure in Canada, Dominion was sold by Verizon to Bain Capital. Susan's employment was terminated in a meeting attended by both Dominion's HR manager and, by teleconference, Verizon's HR manager.

Susan sued Dominion (but not Verizon) for damages arising out of the termination of her employment.

In court, much turned on who was the true employer. The trial judge concluded that Susan was an employee of Verizon in the US. Since she was not employed by Dominion, she was not entitled to any notice of termination under Canadian law. Stanley appealed.

The BC Court of Appeal considered whether the fact that the employment agreement was formed in Texas but performed in British Columbia meant that the proper law of the contract was that of British Columbia, and not that of Texas. It ruled that British Columbia law applies. So the Texas employment agreement that purported to find Susan to be an employee at will was null and void, as rights under BC's *Employment Standards Act* ("ESA") cannot be waived.

The appeal court also ruled that an employee can have more than one employer. While it may be contended that Susan was employed by both Verizon and Dominion, it could not be seriously argued that she was not employed by Dominion. Thus BC's ESA applied to her. The employment at will condition was inconsistent with the ESA. The agreement entered into in Texas was thus set aside. Susan was entitled to reasonable notice under Canadian common law, by her Canadian employer, Dominion. The appeal court sent the matter back to the trial court for its determination of the reasonable notice period.

The lessons from this case are as follows:

- Do not assume that an employment agreement entered into in one country is going to apply in total if the employee is transferred to another country to work for a subsidiary.
- Employers should carefully review all contracts and secondment agreements, to make sure they will not be ruled void if they run afoul of applicable minimum standards legislation. Very clear language is needed regarding what law will apply and where any dispute is to be litigated.
- Do not assume that an employee can only have one employer. In fact, depending on the facts, an employee may have multiple employers, as was the case here. Again, however, this result may be avoided by an expertly drafted contract.

Katherine Pollock advises and represents employers in labour, employment, human rights and business related immigration matters, and is a popular and skilled trainer of employees on all aspects of employment and human rights. She regularly appears before Federal and Provincial administrative tribunals and the civil courts regarding wrongful dismissals, human rights, workers' compensation and employment standards issues. She arbitrates cases before interest arbitrators and in connection with private, rights-based arbitrations. Katherine was recently named a Women of Influence 2012 Canadian Diversity Champion, and was a featured panelist at the 4th Annual Advancement Summit: Women in Law held in Toronto in fall 2012.

Q & A

How Can You Determine if a Worker Is an Employee or an Independent Contractor?

In *Director of Labour Standards v. Acanac Inc.*, which involved determining whether a telephone representative who provided technical assistance to customers was an employee or an independent contractor, the Court determined that the worker was an employee. The Court found, among other things, that the worker, Tomas Sabau:

(1) received relatively minimal training;

(2) did not receive a script to follow;

(3) clocked in for shifts and signed out for breaks;

(4) worked from home using his own computer and the company's modem;

(5) was paid an hourly amount and indicated that he was unaware that he could subcontract;

(6) sent invoices in order to be paid, which concluded with: "Thank you for your business.";

(7) filed tax returns describing the income received as business income; and

(8) signed an independent contractor agreement.

In general, when faced with the question of whether a worker is an employee or independent contractor, the courts

look at the relationship as a whole, with no single factor being on its own determinative. The factors reviewed in this case are common factors to consider, and are often distilled in common law provinces into a fourfold test: control, ownership of tools, chance of profit, and risk of loss (other tests sometimes referred to in the case-law include the "integration test" and the "organization test"). Documentation of the parties' apparent intent (such as the independent contractor agreement referenced in this case) is often described as being "not determinative".

The Canada Revenue Agency ("CRA") sets out the factors it will consider at **www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html#employee_selfemployed**. The CRA indicates that its first step is to ask the worker and payer their intent when they entered into the relationship; however, questions concerning status often arise where one party (the worker) claims to be entitled to a benefit that may only accrue to employees, so this step may tend to result in divergent answers.

The second step the CRA takes is to ask questions related to:

(1) the level of control the payer has;

(2) who provides the tools and equipment;

(3) whether the worker can subcontract or hire assistants;

(4) the degree of financial risk taken by the worker;

(5) the degree to which the worker has responsibility for investment and management;

(6) the opportunity of the worker to profit; and

(7) other factors such as written contracts.

Ultimately, because an independent contractor agreement will not be determinative, a business that would like to ensure that specific workers are deemed to be independent contractors should ensure that as many factors as possible are indicative of a relationship "for services" (a business relationship) as opposed to a relationship "of service" (an employment relationship).

Where a business exercises little to no control over a worker, the worker provides the tools and invests in the business, the worker can subcontract and provides services to several businesses, and the worker can earn a profit by being more efficient, the relationship may be more likely to be deemed a relationship for services; by contrast, where the worker needs to obtain approval for breaks or holidays, follows a method of performing the work mandated by the business, receives the tools of employment from the business, cannot (or, possibly, merely does not) subcontract, and receives a fixed hourly rate of pay, the relationship may be more likely to be deemed a relationship of service.

COURT REFUSES TO REINSTATE PLAINTIFF IN WRONGFUL DISMISSAL ACTION

— Jennifer R. Devins of Roper Greyell LLP. © 2013 Roper Greyell LLP, Employment + Labour Lawyers.

Milkovich v. Field Hockey Canada, 2013 BCSC 486

Peter Milkovich was hired by Field Hockey Canada ("FHC") as the coach of the Women's Junior National Team. He looked forward to taking the team to the Junior World Cup in 2013, which he described as a "coach's dream opportunity" (at para. 5).

Milkovich's written contract of employment included the following provisions related to termination of employment:

13. Either party may agree to terminate this contract upon reasonable notice, with a minimum time of 2 weeks written notice.

14. The Association may terminate this contract in the event the Employee fails to perform the duties specified in this contract in a manner satisfactory to the Association, or fails to fulfill any other terms of this contract.

In June 2012, concerns regarding Milkovich's aggressive style of coaching came to a head. FHC decided to provide him with a "strongly worded warning letter" — but only after the upcoming National Championships. FHC also prepared a draft suspension letter to be issued if Milkovich engaged in any inappropriate behaviour at the Championships.

FHC mistakenly sent the suspension letter to Milkovich on the eve of the Championships. Milkovich was soon reinstated, but subsequent to the Championships.

Less than two months later, FHC terminated Milkovich's employment without cause, providing him with working notice.

Milkovich did not accept that he had been terminated "without cause". He believed that the termination was related to the alleged misconduct for which he had already served a suspension, which in his view was unfair and contrary to the provisions of FHC's policies.

Milkovich alleged that he was wrongfully dismissed on the following grounds:

(a) the employment contract did not allow for termination without cause;

(b) FHC was bound by its policies and did not follow them in terminating his employment;

(c) FHC did not provide reasons for termination, although it did ultimately say that it had lost confidence in him;

(d) FHC's allegations regarding his behaviour were untrue; and

(e) he was disciplined twice for the same conduct.

Milkovich applied for an interim order reinstating his employment pending trial. The B.C. Supreme Court, however, dismissed the application for an injunction for reinstatement.

The Court applied the traditional injunction test and found that Milkovich met only the first part of the test, in that there was a "serious issue" to be tried.

Milkovich failed to satisfy the other two parts of the test, with the Court finding that he would not suffer irreparable harm if the injunction was not granted and that the balance of convenience favoured FHC.

In respect of irreparable harm, Milkovich said that the lost opportunity to coach a national team at a world championship event was "unique and irreplaceable" and could not be compensated by damages (at para. 42).

The Court agreed with FHC's position that damages were an adequate remedy, saying (at para. 46):

> Courts have been wary of requiring an employer to reinstate an employee. The reason for this reluctance is that the continuation of the employment relationship requires the continuation of a personal relationship, which the court is unable to enforce. More importantly, an employer will be more aware than the court of the temperament of the employee and the chances of enforced performance.

The Court accepted that Milkovich's lost opportunity to coach was not irreparable harm. It stated, "The employment agreement does not provide that Mr. Milkovich would have the opportunity to fulfill his dream of coaching this team up to and including the World Cup" (at para. 56).

The Court also held that the balance of convenience favoured FHC (at paras. 64 to 65):

> . . . FHC maintains that it has lost confidence in Mr. Milkovich's suitability for the position. Furthermore, the circumstances surrounding the termination, including Mr. Milkovich's pursuit of a grievance as well as his commencement of this action and an action of defamation against FHC, demonstrate that reinstatement would impose an untenable relationship.
>
> It is clear that FHC lacks sufficient confidence in Mr. Milkovich. . . .

Milkovich's application for an injunction was dismissed.

Practical Pointers

- This decision is good confirmation that reinstatement is highly unlikely to occur in wrongful dismissal cases. The decision does not reference a single Canadian case in which a court reinstated an employee in such a case.

- The decision also confirms that both the employer and the employee have rights in the employment relationship, and recognizes that the employer was entitled to end the employee's employment (at para. 57).
- The Court noted that the employment contract did not guarantee Milkovich the opportunity to realize his dream of coaching the team at the Junior World Cup. FHC determined that its goal of success at the World Cup could be attained without Milkovich. It was entitled to terminate Milkovich's employment on that basis, with the only remaining question being whether FHC owed Milkovich any damages.

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LEGISLATIVE ALERT

Federal

Bill C-44: Leave Related to Critical Illness of Child Now In Force

On June 9, 2013, the federal government proclaimed in force amendments that will provide job protection for an employee who takes time off work to care for his or her critically ill child.

Under the new provisions, a federally regulated employee can take an unpaid leave of absence of up to 37 weeks where a medical practitioner has issued a certificate stating that the employee's child is critically ill and requires parental care.

A "critically ill child" is defined as a person who is under 18 years of age on the day on which the leave begins, whose baseline state of health has significantly changed, and whose life is at risk as a result of an illness or injury.

This leave is available to employees who have completed at least six months of continuous employment with their employer. The employee must provide written notice as soon as possible of his or her intention to take the leave.

An employer is prohibited from dismissing, suspending, laying off, demoting, or disciplining an employee because he or she has applied for leave related to the critical illness of a child. When the leave ends, the employee must be reinstated to the same or a comparable position with the same wages and benefits.

This new leave was enacted by amendments contained in Bill C-44, the *Helping Families in Need Act*, SC 2012, c. 27, which received Royal Assent on December 14, 2012. The Bill also provides for a leave of absence related to the death or disappearance of a child, which came into force on January 1, 2013.

Income Support

The *Helping Families in Need Act* also amended the *Employment Insurance Act* to enact a new Employment Insurance special benefit that will provide up to 35 weeks of income support for parents or legal guardians who take time off work to care for their critically ill children.

To be eligible for the benefit, an applicant must submit a medical certificate indicating that his or her child is critically ill and requires parental care or support. The benefit may be combined with other benefits, such as the compassionate care benefit and parental benefit, and it may be shared between parents.

As with other special benefits, applicants must have worked a minimum of 600 hours in the last year. Self-employed workers who have opted into the EI program must have earned a certain amount of income in the previous calendar year to be eligible for the benefit ($6,342 for those who apply for the benefit in 2013).

This new special benefit came into force on June 9, 2013.

Bill C-60, the *Economic Action Plan 2013 Act, No. 1,* Moves to the Senate

Bill C-60, the *Economic Action Plan 2013 Act, No. 1*, the government's first 2013 Budget implementation Bill, was introduced into the House of Commons for first reading on April 29, 2013, second reading on May 7, 2013, and third reading on June 10, 2013. The Bill then moved on to the Senate where it received first reading on June 11, 2013 and second reading on June 13, 2013.

Bill C-60 proposes amendments to the *Immigration and Refugee Protection Act* in regards to the government's Temporary Foreign Worker Program ("TFWP"), with the goal of minimizing potential misuse of certain elements of the program. The amendments include toughening requirements for employers to prove that they have legitimately been unable to employ Canadian workers with the necessary skills for the job before they request permits for temporary foreign workers. As well, user fees will apply for ministerial review of these requests for permits. Other amendments would authorize the revocation of temporary foreign worker permits, and put an end to the "15 per cent rule" which allowed employers to pay foreign temporary workers up to 15 per cent less than the median rate for Canadian workers for a comparable position, under certain circumstances.

Certain Provisions of the *Jobs, Growth and Long-term Prosperity Act* Amend the *Canada Labour Code*, Effective July 1, 2014

According to a recent order in council, sections 434 to 439 of the federal *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c. 19, will come into force on July 1, 2014. These provisions will amend the *Canada Labour Code* (the "Code") to require employers who provide their employees with benefits under long-term disability plans to insure the plans with an entity that is licensed to provide insurance under the laws of a province. This requirement will be subject to certain exceptions. Additionally, the offences provisions set out in sections 256 and 259 of the Code will be amended and maximum fines increased.

Bill C-279 — Gender Identity Bill Has Reached the Senate

Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*, a Private Member's Bill, has passed through the House of Commons and moved on to the Senate. Private Members' Bills do not commonly succeed unless they represent an initiative supported by the government or are otherwise supported by a majority of the members of parliament.

The Bill proposes to amend the *Canadian Human Rights Act* to include gender identity as a prohibited ground of discrimination. It would also amend the *Criminal Code* (the "Code") to include gender identity as a distinguishing characteristic protected under section 318 of the Code and as an aggravating circumstance to be taken into consideration under section 718.2 of the Code at the time of sentencing.

Bill C-279 received first reading in the House of Commons on September 21, 2011, second reading on June 6, 2012, and third reading on March 20, 2013. It then received first reading in the Senate on March 21, 2013 and second reading on May 29, 2013.

Alberta

Bill 18: *Pooled Registered Pension Plans Act* Is Passed

Bill 18, the *Pooled Registered Pension Plans Act*, SA 2013, c. P-18.5, recently received Royal Assent. The Bill contains provisions that will complement the federal *Pooled Registered Pension Plans Act*, which took effect on December 14, 2012.

Pooled registered pension plans are intended to provide an alternative savings option to allow self-employed persons and employees of companies without pension plans to pool registered pension funds so as to achieve lower costs in relation to investment management and plan administration fees. These plans would be large, defined contribution plans that would be professionally managed by plan providers such as banks and insurance companies. They would permit portability, allowing members' balances to move with them if they move to other jobs.

Bill 18 received first reading on April 18, 2013, second reading on May 6, third reading on May 7, and Royal Assent on May 27. It will come into force on proclamation.

Bill 203: *Employment Standards (Compassionate Care Leave) Amendment Act, 2012* Is Passed

On May 27, 2013, Private Members' Bill 203, the *Employment Standards (Compassionate Care Leave) Amendment Act, 2012*, SA 2013, c. 6, received Royal Assent. The Bill contains amendments that will provide job protection for employees who take time off to care for terminally ill family members.

The amendments will provide that an employee may take an unpaid leave of absence of up to eight weeks if he or she is the primary caregiver of a seriously ill family member. The employee must provide a physician's certificate stating that the family member has a serious medical condition, with a significant risk of death within 26 weeks, and that the family member requires care or support.

For the purposes of the leave, "family member" includes:

- the employee's spouse or common-law partner;
- the employee's child or the child of the employee's spouse or common-law partner;
- the employee's parent or the spouse or common-law partner of the employee's parent; and
- any other person designated by regulation.

To be eligible to take the leave, the employee must have completed at least 52 consecutive weeks of service with his or her employer. The employee must provide at least two weeks' notice of the leave, unless circumstances necessitate a shorter period.

An employer will be prohibited from terminating or laying off an employee who takes compassionate care leave. Upon the expiry of the leave, the employee must be reinstated to the same or a comparable position with no loss of the wages and benefits that he or she had accrued to the start of the leave.

Bill 203 received first reading on November 1, 2012, second reading on April 22, 2013, third reading on May 13, and Royal Assent on May 27. It will come into force on proclamation.

Minimum Wage To Increase September 1

Effective September 1, 2013, Alberta's general minimum wage rate will increase to $9.95 per hour, a 2.1% increase from the current rate of $9.75 per hour.

In addition, the minimum wage for salespersons and land agents will increase from $389 per week to $397 per week, and the rate for live-in domestic workers will rise from $1,854 per month to $1,893 per month.

The minimum wage for liquor servers will remain at $9.05 per hour.

Manitoba

Leave Related to Critical Illness of a Child In Force

As of June 9, 2013, employees in Manitoba may take up to 37 weeks of unpaid leave to care for a critically ill child where a physician has issued a certificate stating that the child is critically ill and requires the employee's care or support.

A "critically ill child" is defined as a person who is under 18 years of age on the day on which the leave begins, whose baseline state of health has significantly changed, and whose life is at risk as a result of an illness or injury.

To qualify for this leave, the employee must be the parent, step-parent, adoptive parent, foster parent, or guardian of the child, or a person who has the care, custody, or control of the child and is considered like a close relative, whether or not they are actually related. As well, the employee must have worked for the same employer for at least 30 days.

An employee who wishes to take the leave must provide notice of at least one pay period, unless circumstances necessitate a shorter period, and must provide a copy of the physician's certificate as soon as possible.

An employer is prohibited from terminating or laying off an employee who takes the leave. When the leave ends, the employee must be reinstated to the same or a comparable position, with not less than the wages and any other benefits that he or she earned immediately before the leave began.

The leave was created by Bill 3, *The Employment Standards Code Amendment Act (Leave Related to the Critical Illness, Death or Disappearance of a Child)*, SM 2012, c. 45, which received Royal Assent on December 6, 2012. The Bill also created a leave of absence related to the death or disappearance of a child, which came into force on January 1, 2013.

Employees who take this leave may be eligible for the federal government's new Employment Insurance special benefit for parents of critically ill children (discussed above).

DISABILITY Q & A

How does a supplemental unemployment benefits plan operate?

A supplemental unemployment benefits ("SUB") plan is a form of income replacement that is often linked to a short-term disability plan. SUB plans are employer programs that "top up" the amount of benefit that an individual is receiving through Employment Insurance ("EI") benefits.

SUB plans are self-insured by an employer and can be used to supplement an employee's earnings to up to 95% of pre-disability income if the disability is due to temporary work stoppage, training, illness, injury, or quarantine. A SUB plan is also permitted to supplement an employee's EI benefits received while on maternity or parental leave.

SUB plans must be formally documented, and in most cases require special government registration in order not to reduce the amount of EI payable to the employee.

How does maternity leave relate to disability plans?

In 1989, the Supreme Court of Canada decided in *Brooks v. Canada Safeway*, [1989] 1 SCR 1219, that pregnancy should be considered a valid health-related reason for absence from the workplace. In 1992, the Alberta Court of Queen's Bench ruled in *Alberta Hospital Association v. Parcels*, 90 DLR (4th) 703, that a portion of any pregnancy leave is health-related. As a result, an employee on such a leave should be compensated for this absence, as other employees would be while absent from work for other health-related reasons.

Consequently, employers have generally taken one of three approaches to managing their group benefits plans:

- Providing no income replacement to employees while on pregnancy leave.
- Providing income replacement to employees while on pregnancy leave during the health-related portion of the leave, but not the voluntary portion. The health-related portion of the leave is typically considered to be from the date of birth to between six and eight weeks following, depending on the nature of the delivery. In cases of delivery by Caesarean section, this period may be extended to 10 weeks. These employers generally do not require medical proof of inability to work to qualify for income replacement.
- Providing income replacement to employees during the entire pregnancy leave. These employers generally do not require medical proof of inability to work to qualify for income replacement.

If income is provided during the leave, it is often administered through a special SUB program that allows payment to employees during the health-related portion of maternity leave. This form of SUB plan is permitted to supplement up to 100% of the employee's pre-disability income, and does not require special government registration.

Income replacement may also be provided through a group short-term disability program.

What is a long-term disability plan?

Group long-term disability ("LTD") plans were first introduced in Canada in the 1960s, and are designed to provide monthly income replacement to those employees who are unable to work for a prolonged period of time due to accident or illness.

LTD benefits are usually payable for as long as the employee continues to provide supporting medical evidence of a disability that meets the requirements specified in the group insurance contract. The benefit period typically terminates at age 65.

How does an insurance carrier underwrite LTD benefit rates?

Group LTD rates are expressed at a rate per $100 of coverage. The rates are determined by a demographic analysis of all employees under the program. This review includes the age, sex, and occupation of each employee. Occupational rating is particularly important, as insurance companies assign occupational risk codes for numerous job classifications. Insurance companies also consider the nature of business of the employer in order to determine the risk level of the group.

Similar to group life insurance, particular interest is given to the predicted rates of mortality and morbidity within a group insurance program when determining premiums. Mortality refers to the number of deaths in a group of people, usually expressed per 1,000 people. The age and sex of employees to be insured are part of the mortality calculation. Morbidity refers to the incidence of sickness and accidents within a specific group of individuals.

The insurance company reviews the group LTD rates at each renewal. For smaller-sized employers, any claims experience under the LTD insurance benefit is not usually considered credible, and instead is pooled with other groups of a similar size that the insurer underwrites. For these employers, the overall performance of the insurance company's block of similar business will determine future premium adjustments. For a large employer, renewal rates can be affected by the actual claiming history of the group, since the insurance company gives credibility to the morbidity rates of the specific employee population.

Group LTD plan design is also an important consideration when determining LTD premium rates. Changes in elements such as the qualifying period, non-evidence maximum benefit amount, type of offsets, definition of disability, or benefit schedule all impact the required premium level.

What is subrogation?

Subrogation is a right under common law that allows the substitution of one party for another as creditor. Third-party subrogation clauses are often specifically written into group LTD contracts to allow insurance companies to recover funds due to the liability of a third party.

One example of subrogation is when a disabled employee files a suit against another party for causing his or her disability. If the employee receives compensation for lost earnings, the insurance company can recover the cost of the LTD benefits from the employee's settlement.

What is a qualifying period?

The qualifying period, or elimination period, is a specific length of time that an employee must wait before becoming eligible to receive disability benefits. The qualifying period begins on the first date of disability and allows the insurance company an opportunity to assess and adjudicate the claim.

Short-term disability qualifying periods are typically very short since the short-term disability benefit is designed to provide income replacement during small periods of absence from work. Qualifying periods for short-term disability benefits often last for seven days in the case of disability due to illness or injury. If an individual is hospitalized, many short-term disability programs remove the qualifying period and allow for benefit payment to begin as of the first day that the employee was absent from work.

Qualifying periods for short-term disability programs also serve to discourage claims by employees for the occasional absence due to a common cold or other less serious ailments. Administrative time spent processing such claims is also reduced by utilizing a waiting period.

LTD qualifying periods often equal the maximum benefit length provided by an employer's short-term disability, or salary continuance program. In the absence of any other formal disability program, LTD qualifying periods often equal the maximum benefit period offered by EI disability benefits. The current maximum benefit period for EI is 17 weeks (including a two-week waiting period).

Longer qualifying periods also serve to lower the risk to the insurance company of providing disability benefit payments, as some claims will naturally terminate during the waiting period.

How is disability defined?

The definition of disability establishes the means by which an employee's medical condition will be evaluated relative to his or her occupation. The two main definitions of disability are:

- *Own occupation:* The own occupation definition of disability specifies that an employee is considered disabled if he or she is unable to perform the regular duties of his or her own occupation. This definition is commonly used for short-term disability programs and salary continuance plans. The own occupation definition of disability is also commonly seen during the first 24 months of an LTD benefit.
- *Any occupation:* The any occupation definition of disability specifies that an employee is considered disabled if he or she is unable to perform the duties of any occupation. This definition is commonly used as part of the LTD benefit, often after the first 24 months of benefit payments.

During a claim, a disabled employee's file will continue to be reviewed to ensure that the definition of disability continues to be met.

How might a pre-existing condition affect a disability claim?

Most group LTD contracts contain standard exclusion clauses for pre-existing medical conditions. Because group insurance policies typically do not require medical evidence to insure employees, pre-existing condition clauses allow the insurance company some protection against the risk of unhealthy employees joining the program. Employers are also afforded some protection by these clauses, as the high cost of LTD benefit claims may ultimately affect the group's LTD premiums levels.

One of the most common pre-existing condition clauses states that benefits are not payable for a total disability that commences during the first 12 months of an employee's coverage if the disability results from any sickness or injury for which the employee was treated or attended by a physician, or for which prescribed drugs were taken within 90 days prior to the effective date of the employee's insurance.

If an employee with a pre-existing condition becomes disabled due to an illness or injury unrelated to the condition, the LTD benefit will not be affected.

How does an insurance company adjudicate disability benefits?

Insurance carriers adjudicate insured disability benefits based on the definition of disability in the group insurance contract.

Most insurance companies require the following information in order to assess a claim:

- *Employee statement:* This document includes personal information from the claimant, including date of birth, age, and salary at the date of disability. This statement also allows the employee to describe the regular functions of his or her occupation, and any relevant details of his or her medical condition. This form is confidential, and can be submitted directly to the insurance company without review by the employer.
- *Employer statement:* This document verifies the employer's internal records, such as payroll and any premium or contribution cost sharing. This statement provides the employer with a means to describe the job description of the employee and to express any concerns or comments that are appropriate to the adjudication process. This statement is often completed in advance of the employee statement, and forwarded to the employee. Employers may provide additional confidential information or opinions to the disability adjudicator in addition to this form, if necessary.
- *Physician statement:* The employee's physician or specialist completes this form. The physician's statement includes detailed medical information, and the physician's opinion of the employee's functional abilities relative to his or her occupation.

In some cases, additional documents may accompany the disability claim, such as a copy of the employee's last pay stub, a copy of the employee's birth certificate, laboratory tests, or X-ray results.

Depending on the nature of the claim, an insurance company may be able to adjudicate benefits solely on the

information contained in the initial claim submission. However, additional specific medical information is often requested, either from the employee or directly from the physician.

An insurance company may request an independent medical examination of the claimant, and may also consult with the insurer's own physicians.

Disability adjudicators will also often contact the employer directly in order to obtain more information relative to the claimant's job description, or when determining if there is a possibility for a rehabilitation program.

ON THE CASE

Union Health Plan Did Not Discriminate Against Pregnant Employees

Alberta Human Rights Commission, December 13, 2012

Malko-Monterossa learned she was pregnant soon after starting a welding apprenticeship. She was concerned that the work environment was hazardous to the health of her or her fetus as she was regularly exposed to toxic fumes and chemicals. In addition, she was concerned that the union group benefit plan did not address maternity and parental leave. The health plan provider informed Malko-Monterossa that the plan excluded pregnant employees from receiving benefits where a normal pregnancy prevented her from working due to the nature of her job. After providing a doctor's note, Malko-Monterossa asked for a clerical position in the office, where she believed she would not be exposed to environmental hazards. Malko-Monterossa was informed that the employer was unable to provide her with alternate work. In addition, her claim for weekly indemnity benefits was denied based on the medical documentation provided. Malko-Monterossa brought a discrimination complaint against the union and the administrators of the health plan, claiming discrimination on the basis of gender and pregnancy.

The complaint was dismissed. The union's health plan did not differentiate between men and women, or make it more difficult for pregnant applicants to receive weekly indemnity benefits. All applicants were required to provide medical evidence that they could not, for medical reasons, perform the normal duties of their position. The exclusion of benefits during a leave of absence, including maternity leave, was not discriminatory since the health plan paid benefits only when a member was incapacitated to the extent that he or she could not perform his or her usual duties. A pregnant employee would receive benefits if, for medical reasons, she was unable to perform the duties of her position, or if continuing to work represented a risk to her health or the health of her fetus. Malko-Monterossa had not worked enough hours to qualify for maternity leave, and did not request a leave of absence, she just asked for accommodation that the employer was unable or unwilling to provide. The health plan did not treat pregnant employees any differently and, therefore, it did not discriminate against Malko-Monterossa on the basis of gender or pregnancy. However, there was a *prima facie* case of discrimination against the insurance company and the plan administrators. Malko-Monterossa was told that pregnant women were excluded from receiving benefits where a normal pregnancy prevented them from working due to the nature of their job, which was discriminatory. However, the actual health plan did not include this exclusion, and her claim was denied as a result of insufficient medical evidence, which was not discriminatory.

Malko-Monterrossa v. SMWIA Local 8, 2013 CLLC ¶230-015

Arbitrator's Decision That Injured Employee Was Unfairly Terminated Was Not Intelligible or Justifiable

Court of Appeal of Alberta, February 12, 2013

Six months into his 18-month probationary period as a constable, Lester suffered a hernia that required surgery. He refused modified work duties, choosing instead to stay home and work on his rehabilitation. Following his return to work, Lester suffered a back injury and was placed on modified duties. Prior to his return back to regular duties, Lester was asked to provide a doctor's note clearing him for work and was told to report for a different shift. Lester disregarded these instructions, and reported to his original squad without providing the necessary doctor's note. As a result, he was cited for insubordination. After Lester's family doctor mentioned that Lester was showing signs of depression, the Lethbridge Regional Police Service (the "Police Service") commissioned a psychological assessment of

Lester. The assessment concluded that Lester was psychologically unable to manage the challenges of police work. Lester was terminated at the end of his probationary period. The union filed a grievance on his behalf, and Lester filed a human rights complaint. The arbitrator determined that Lester had been discriminated against and had been unfairly terminated. The chambers judge allowed an application for judicial review. The union appealed.

The appeal was dismissed. The Police Service did not engage in stereotypical thinking in its decision to terminate Lester. The Police Service did not minimize the severity of Lester's injuries, it provided modified duties, and it insisted that Lester remain off work until he was completely medically fit. In contrast, Lester persisted in continuing to work and in returning to work after being informed that he was not medically fit. It was not bad faith for the Police Service to prefer one expert over another when determining Lester's suitability for work. The conclusion that Lester's refusal of modified duties demonstrated a lack of commitment to his employment was not stereotypical thinking about disabled employees; rather, it was a reaction to Lester's decisions, and an objective assessment of his workplace attitudes. Finally, Lester's disability did not prevent him from following orders. Therefore, none of the factors contributing to the termination amounted to bad faith or discrimination. The chambers judge was correct in quashing the arbitrator's decision, since the decision was not intelligible or justifiable and the resulting award was not one that was available based on the facts and the law.

Lethbridge Regional Police Service v. Lethbridge Police Association, 2013 CLLC ¶220-022

Division of Husband's LIRA Was Governed Under Part 6 of *Family Relations Act*

Supreme Court of British Columbia, February 22, 2013

The parties commenced cohabitation in 1994 or 1995, married in 1997, and separated in 2005. From 1988 to 1995, the husband participated in his employer's pension plan. Following a layoff in 1995, the husband's employment was terminated in October 1996. At the time of the termination of his employment, the husband transferred his pension contributions to a locked-in retirement account ("LIRA"), pursuant to section 33 of the *Pension Benefits Standards Act* ("PBSA") and section 29 of the *Pension Benefits Standards Regulation* ("Regulation"). Following separation, the parties divided their condominium, which was the main family asset, but failed to come to an agreement regarding the division of the LIRA. As of June 30, 2012, the LIRA's value was $47,835.35. The wife took the position that the LIRA was a family asset, with division governed under Part 5 of the *Family Relations Act* ("FRA"), and with the presumption of equal division. The wife further argued that the husband's transfer of his pension contributions to the LIRA resulted in the loss of their character as a pension. The husband agreed that the LIRA was a family asset, but argued that it was a pension, the division of which was governed by Part 6 of the FRA. Under Part 6, the spouse's share would be restricted to the portion of pensionable service accrued during the marriage, and under the facts of the parties' relationship, accrual occurred only before the marriage, not after. The wife applied for a declaration that the LIRA was a family asset pursuant to Part 5 of the FRA.

The application was dismissed. A LIRA was properly dealt with as a family asset under section 58 of the FRA, but it was not one of the types of "pension plans" specifically dealt with under Part 6 of the FRA. Nevertheless, a LIRA was properly interpreted as coming within the definition of "pension," therefore, the division of a LIRA on marriage breakdown was governed by Part 6 of the FRA and not Part 5. There was no clear guidance from jurisprudence on how broadly to interpret "pension" or how to characterize a LIRA, but consideration of the scheme of the PBSA supported viewing the LIRA as a pension. The transfer of pension contributions on termination of membership required that the contract terms of a locked-in RRSP comply with section 19 of the Regulation. The language of the Regulation required that the pension contributions transferred to a LIRA were specifically designated for the purpose of a pension. The language of the legislation clearly reflected the legislative objective of protecting pension contributions of employees who were terminated before retirement. There was no support for treating LIRAs differently than pensions for purposes of division simply because, on the triggering event, the member was no longer making contributions to the plan.

South v. De Asis, 2013 CBPG ¶8022

Appeal Court Affirmed Dismissal of Claims That Government Breached Implied Term of Contract and Fiduciary Duty

Court of Appeal for Saskatchewan, February 5, 2013

The appellants were retirees under the respondent Government of Saskatchewan's pension plan, the Public Service Superannuation Plan ("PSSP"), which was governed under *The Public Service Superannuation Act*. The original legislative scheme of the PSSP did not index pension benefits against inflation. The province responded to considerable consternation on the part of some retirees (beginning in the 1970s) with an *ad hoc* series of increases in pension benefits. The retirees commenced a class action against the government, alleging that the government was legally obligated to provide benefits above and beyond those specified in the legislation governing the PSSP. The retirees claimed that, based on various statements and representations made by, or on behalf of, the government, it was an implied term of their contract of employment that the government would keep the plan members "reasonably current" so that their pensions' purchasing power would not be seriously eroded, and that the government had breached this implied term. The retirees argued in the alternative that the benefits were payable because the government had a fiduciary duty to prevent the retirees' pension entitlements from being eroded by inflation, and the government had breached this duty. The trial judge rejected both claims and dismissed the class action. The retirees appealed.

The appeal was dismissed. Applying the appropriate standard of review, the Court found that the trial judge did not err in concluding that there was no implied term of the employment contract respecting inflation protection. The evidence showed a long history of statutory changes to the PSSP, and such history could not be reconciled with the idea that the PSSP was amended at some point by the addition of an implied term. There was also a record of consistent refusals by the government to accede to union demands for cost of living allowance increases. The Court found it difficult to accept that, at the same time as the union was demanding such increases, there was a contractual obligation to protect PSSP members from the effects of inflation. Additionally, legislative changes were made in 1997 to provide for automatic adjustments to pension benefits accounting for only 70% of ongoing changes in the cost of living, and such changes were difficult to reconcile with the notion that, at the same time, the government was under a contractual obligation to keep PSSP members "reasonably current" in relation to cost of living increases. There were no errors of reasoning in the trial judge's conclusion that no breach of fiduciary duty occurred. The trial judge correctly rejected the argument that a fiduciary relationship existed requiring the government to act in the best interests of the retirees with respect to cost of living increases. Jurisprudence supported the view that the nature and responsibilities of government were to mediate competing interests for scarce public resources and to act in the best interests of the community as a whole. Therefore, there was a basic limitation on the extent to which fiduciary obligations could or should be imposed on the government. Under the circumstances, no stand-alone fiduciary duty existed and no breach occurred.

May v. Saskatchewan, 2013 CBPG ¶8020

Sale of Dilapidated Hotel Was a Transfer of Business

Saskatchewan Labour Relations Board, February 22, 2013

A hotel, which had been operating under the flag name of "Howard Johnson", was in a state of disrepair when 1492559 Alberta Inc. (the "owner") purchased it. Prior to the owner taking possession, the hotel closed and Howard Johnson Canada cancelled its franchise agreement with the previous owner. Six weeks later, the owner took possession and obtained franchise approval from Howard Johnson Canada. A number of union employees were hired back at this point; however, after the hotel was temporarily closed due to water damage, only one union member remained. The union filed an application with the Saskatchewan Labour Relations Board (the "Board"), alleging that the owner refused to recognize the union as the exclusive bargaining agent and was failing to comply with the collective agreement.

The application was allowed. In its application, the union listed Howard Johnson Canada and the manager, Singh, as the new owners of the hotel, even though they did not have any ownership interest in the hotel. The actual owner, 1492559 Alberta Inc., was not added as a party to the union's application and, therefore, the Board did not have the authority to grant any remedial relief against the owner other than determining whether it was a successor or not. The owner was, in fact, a successor to the collective bargaining obligations, and a transfer of a business had occurred. When the purchase occurred, the economic elements of the hotel were distressed; the purchase occurred through foreclosure

proceedings and the building was dilapidated. While the hotel was in poor physical condition, the owner acquired more than just an idle collection of surplus assets. The owner acquired the essential elements of a business. The business activities carried on at the workplace were essentially the same as those carried on by the previous owner. The employees were performing essentially the same work, and the business was providing essentially the same services.

SJBRWDS v. Singh, 2013 CLLC ¶220-024

SOCIAL MEDIA STRIKES AGAIN . . . AND AGAIN!

— Parisa Nikfarjam. © 2013 Rubin Thomlinson LLP.

Another employee has recently been suspended for his online posts. After officiating a game in Sault Ste. Marie, Ontario Hockey League ("OHL") referee Joe Monette tweeted the following: "Soo Saint Mari, two words, Slim Pickens. #noteeth #hicktown #allfaties." Not surprisingly, the residents of Sault Ste. Marie did not appreciate the comment, and an uproar quickly ensued.

In an attempt to quell the upset caused by his tweet, Mr. Monette subsequently tweeted: "My tweet last night was not meant to be offensive and was meant as a joke between myself and a buddy of mine that lives in the Soo. I apologize if I offended anybody". The OHL was not satisfied with Mr. Monette's blanket apology, and suspended him for the rest of the season and playoffs.

Mr. Monette's suspension is the most recent in a series of disciplinary actions taken against employees for their social media posts.

- Following the death of Amanda Todd, a 15-year-old British Columbia teen who took her own life after years of bullying, a Facebook memorial wall was created in her honour. Justin Hutchings of London, Ontario, posted a profane comment to that memorial wall, which suggested that he was glad the teen had taken her life. Mr. Hutchings' employer, Mr. Big & Tall Menswear was readily identifiable on his Facebook account; and upon learning of the posting, it immediately terminated Mr. Hutchings' employment. Kamy Scarlett, Senior Vice-President of Store Operations and Corporate HR with the employer, commented that the termination was based on its "zero tolerance for the mistreatment of others no matter what form it takes."

- Just outside of another city of London (this time in England), a teen named Paris Brown, who had recently been appointed the first youth police and crime commissioner for Kent, faced similar outrage when her tweets were published in the local newspaper. In that regard, Ms. Brown's tweets bragged about her drinking and drug use; criticized the local pizzeria employees for not speaking "proper English"; and included various racist and homophobic comments.

  While members of the British Parliament called for Ms. Brown's resignation, Ms. Brown defended herself by stating that the tweets were taken out of context, and that she was "wildly exaggerating" on Twitter. Despite Kent Police and Crime Commissioner Ann Barnes' supportive statement that Ms. Brown's tweets were not unlike the posts of many other teenagers on social media, Ms. Brown ultimately resigned.

These recent examples seem to contradict the conventional wisdom that what employees do on their own time is their own business.

In fact, what has emerged from recent arbitral decisions is that employers can take the position that an employee's off-site and off-duty conduct online will constitute employment-related misconduct if:

- the employee's conduct harms the employer's reputation;
- the employee's conduct renders the employee unable to perform his/her duties satisfactorily;
- the employee's conduct leads to the refusal, reluctance, or inability of the other employees to work with him/her; or
- the employee's conduct makes it difficult for the employer to properly carry out its function of managing its business and efficiently directing its workforce.

If an employee has engaged in misconduct, it is incumbent upon an employer to determine what discipline is appropriate; and in doing so, employers should treat social media misconduct just like any type of workplace misconduct. In that regard, employers should not consider an online post in isolation when taking disciplinary steps,

and should instead apply a contextual approach, taking into account the following:

- the employee's length of service;
- the employee's disciplinary record;
- the nature of the employee's position, especially if the employee occupies a position of trust; and
- the employee's response when confronted with the online misconduct. The employee's honesty and remorse can be indications that the employment relationship can be salvaged and has not been irreparably harmed.

That said, it is also important to recognize that, regardless of whether or not an employee's online misconduct rises to the level of "just cause" for termination without notice and severance, it remains an employer's prerogative to proceed with a "not for cause" dismissal, and provide appropriate termination arrangements. In other words, an ill-advised social media post may cost an employee his/her job regardless of whether or not it represents "just cause."

As social media becomes a more dominant form of expression for employees, employers should expand their conception of employment-related misconduct to include off-site comments, particularly when their reputations can be so easily tarnished online.

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HR Pressured To Quantify Payoff of Talent Development, Survey Shows

Posted: June 13, 2013

Human resources professionals are facing growing pressure to quantify the business benefits of talent development programs, according to a survey of more than 2,000 senior executives in the field from 14 countries by Right Management. A global average of 82 percent of the HR executives agreed or agreed somewhat with the statement: "At our organization, we are under increased pressure to measure the business impact for talent development initiatives." By country, the following percent of participants agreed with that statement:

- India: 93 percent;
- Singapore: 93 percent;
- China: 91 percent;
- Brazil: 89 percent;
- Canada: 85 percent;
- UK: 85 percent;
- US: 83 percent;
- Norway: 79 percent;
- Australia: 76 percent;
- Japan: 76 percent;
- France: 75 percent;
- Netherlands: 69 percent;
- Belgium: 63 percent; and
- Germany: 61 percent.

Development professionals and HR executives are being held more accountable for their talent management investments, said Gerald Purgay, Senior Vice President of Right Management. "The survey findings show this is a global

trend, and I presume it will only become more intense as top management demands better metrics, as well as evidence that such programs mesh with the organization's overall strategy."

According to Purgay, HR and training professionals are fortunately becoming more adept at gauging the success of their leadership development and similar efforts. "Respondents were asked if they concur with the statement: At our organization, we are highly effective at measuring the business impact for talent development initiatives. A global average of 68 percent of the HR executives either agreed or agreed somewhat. Strongest agreement on this point was expressed by respondents from Brazil, China, India and Singapore."

Organizations worldwide are confronting similar challenges, believes Purgay. "It's now a global contest for them to recruit and develop the best talent, which is by its nature is always limited. Employees need new skills to prepare them to deal with the complexity of the business world as well as to manage individuals and teams."

Source: Right Management at www.right.com.

DID YOU KNOW . . .

. . . That Employer Responsibilities with Respect to Social Insurance Numbers Have Changed?

The Social Insurance Number ("SIN") was created in 1964 as a means to register individuals for federal government programs, namely the EI and the CPP programs. Since 1967, it also has been used for taxation purposes. The requirement for a SIN card dates from an era when a physical card was the most convenient way for recipients to use and remember their SIN — in a wallet-sized format. The SIN card was never intended to be used as an identity card, as it does not contain any security features or identifying attributes. Due to modern technology and tangible threats such as identity fraud, the Government of Canada has been encouraging individuals to keep their SIN cards safe by avoiding carrying them on their person, but given their convenient wallet-sized shape, many people tend to overlook such warnings.

In accordance with the government's plan to return to a balanced budget by 2014-2015, Human Resources and Skills Development Canada committed to stop the issuance, production, and distribution of the SIN card. Operationally, this will be achieved by March 31, 2014, when new SINs will be issued in letter format only. SIN cards currently in circulation will remain valid. To do so, legislative amendments in the *Jobs, Growth and Long-term Prosperity Act*, which received Royal Assent on June 29, 2012, make the issuance of SIN cards by the Canada Employment Insurance Commission discretionary rather than mandatory.

The SIN and its database, the Social Insurance Register ("SIR"), are currently used by many programs. To reflect the fact that EI is no longer the sole user of the SIN, the legislative amendments also transferred the legal authorities for the SIN/SIR from the *Employment Insurance Act* to the *Department of Human Resources and Skills Development Act*.

Effective April 30, 2013, the *Canada Pension Plan (Social Insurance Numbers) Regulations* were amended. One of the biggest changes is that employers benefit from the fact that the physical SIN card no longer needs to be shown. Instead employers must require employees to inform the employer of their SIN.

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