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**DENTONS**

**WEBINAR SERIES**  
LEGAL UPDATES  
FOR CANADIAN EMPLOYERS

# Hidden workforce risks: Strategic and legal considerations for employers

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Grow | Protect | Operate | Finance



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# The employees you forgot you had and those you inherited

Stephanie Lewis

# Part 1: Employees you forgot

Out of sight, out of mind

## Who are forgotten employees?

- Individuals who remain employed but have been overlooked or forgotten by their employer.

## How does this happen?

- Extended leaves (including layoffs and medical leaves)
- Casual employees who stop taking shifts
- Remote employees who work without oversight

# Part 1: Employees you forgot

## Extended leaves

### Employees on temporary layoff

- All provinces allow for employees to be temporarily laid off without it being considered an automatic termination under employment standards legislation if certain conditions are met.
- In Ontario, employees with temporary layoff clauses in binding employment agreements can be laid off for a period of:
  - Not more than 13 weeks in a period of 20 consecutive weeks; or
  - Less than 35 weeks in a period of 52 consecutive weeks (inclusive of the above 13 weeks), but only if, throughout the layoff, the employer provides prescribed benefits to the employee (retirement plan, pension plan, group/employee insurance plan) or substantial payments

# Part 1: Employees you forgot

## Extended leaves

### **Risk of not properly tracking temporary layoffs**

- If an employee is not recalled to work before the applicable temporary layoff period has expired, the employee's employment is deemed to have been terminated; and
- All applicable terminations entitlements are owing to the employee.

### **If termination entitlements are not paid out, there is a possibility of:**

- A civil claim for wrongful dismissal.
- A Ministry of Labour Complaint alleging a breach of provincial employment standards .



# Part 1: Employees you forgot

## Extended leaves - Steps to take now to avoid being caught off guard later

Tips for avoiding liability when managing temporary layoffs:	Considerations
Track the duration of all temporary layoffs.	Include start date, length of layoff to date and statutory maximum recall date.
Recall employees from layoff prior to the statutory maximum total length of such layoffs.	Provide such employees with written notice they are being recalled, along with the date they are expected to return to work.
Provide termination entitlements and updated Records of Employment to employees who are not recalled prior to the statutory maximum length of such layoffs.	Deemed date of termination is dependent on applicable employment statutes. In Ontario, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, the Yukon and federally, the date of termination is the first day of layoff and entitlements run from that date.
If large group of employees is deemed terminated, be mindful of mass termination entitlements and confirm whether these apply.	Could result in longer statutory notice periods and additional filing obligations.

# Part 1: Employees you forgot

## Extended leaves

### Medical leaves

- Employees who go off on medical leaves could remain out of the workplace for extended periods of time depending on their medical conditions and prognosis.

### Risk of not properly tracking the status of employees on long term medical leaves:

- Missed accommodation opportunities and breaches of associated human rights obligations.
- Missed return to work opportunities.
- Continuing accrual of increased statutory minimum termination entitlements for employees with no reasonable prospect of return.
- If contact with the employee is not maintained on a reasonable frequency, it becomes progressively harder to get them to respond to information the longer they go without contact.



# Part 1: Employees you forgot

## Extended leaves - Steps to take now to avoid being caught off guard later

Tips for managing employees on extended medical leaves	Considerations
Periodically review the status of the leave.	Confirm when most recent update was received from the employee and whether a further update is required.
As appropriate, seek updated medical information related to prognosis and medical restrictions.	Not entitled to diagnostic information but entitled to know when employee is anticipated to be able to return to work and any associated medical restrictions relating to the employee's position.
If medical leave extends beyond 2 years, consider whether frustration of employment principles apply.	Seek medical documentation confirming whether there is a reasonable prospect of the employee being able to return to work in the foreseeable future. If no: pay out termination entitlements. If yes: engage accommodation process.

# Part 1: Employees You Forgot

## Casual Employees who Stop Attending Work

### Casual Employees who stop accepting shifts

- Such employees are not obligated to accept shifts.
- Absent a termination of employment, refusal to accept shifts will not terminate the employment relationship.

### Risks of not properly tracking Casual Employees:

- The Company could potentially miss a deadline to file a Record of Employment (“ROE”) with Service Canada and be liable for damages or fines.
- The Company could incur the cost of employee perquisites for employees who are no longer actively employed and providing services to the Company (such as employee discounts).
- The Company could miss a temporary layoff deadline.
- If Casual Employees are regularly declining shifts, they may be holding down several jobs. This may be an indicator that a conversation is warranted to ensure that the Casual Employee is not also working for a competitor.

# Part 1: Employees you forgot

Casual employees who stop attending work - steps to take now to avoid being caught off guard later

Tips for managing casual employees	Considerations
Diarize / Track the last time each casual employee attended work.	If a casual worker has not worked or earned insurable earnings in 30 days, an RoE must be issued.
Periodically consider whether there are sufficient casual workers to address the Company's needs.	If there is an excess of employees who are not regularly attending work, consider whether to maintain their employment status. If the decision is made to terminate their employment, advise them in writing and pay out any termination entitlements.
If employee regularly declining shifts, consider having a discussion to determine the reason.	Allows an opportunity to address concerns regarding potential employment with competitors.



# Part 1: Employees You Forgot

## Employees Working Outside of the Workplace

### Remote Workers

Post-Covid, there has been an increase in people who perform their work remotely, whether from their homes or another location.

Risks of not remaining in good communication with/providing sufficient oversight for these employees:

- Occupational Health and Safety Risks
- Possible overtime issues
- Potential jurisdictional issues in the event of relocation
- Potential confidentiality issues with employer IP and technology assets
- Risk of underwork/time theft if employee not being managed and held accountable for producing work product

# Part 1: Employees You Forgot

Employees working outside of the workplace - Steps to take now to avoid being caught off guard later

Tips for managing remote workers	Considerations
Ensure health and safety of workers in their remote workplaces.	Consider ergonomic issues, other potential hazards in the workplace, potential domestic violence issues. Investigate and resolve any issues.
Track employee hours worked.	Non-exempt employees may be working hours that result in overtime entitlements. Recommend requiring that such employees submit their hours regularly and that these hours be reviewed by the Company.
Institute a Remote Work Policy	Address relevant issues such as work hours, home work area, remote work not being a substitute for family care arrangements, authorized use of company property, and jurisdiction.

# Part 2: Employees You Inherited

## Employees Whose History with the Company is Unclear

Employees without employment agreements whose start date precedes current institutional memory

Employees who were acquired through a merger or acquisition

### Risks associated with inherited employees or those whose employment history with the Company is unclear:

- Unknown compensation / remuneration arrangements could result in both inaccurate records and a potential for constructive dismissal claims.
- Outside of Quebec, employee entitlements in the event of a dispute will be determined at common law in the absence of a binding employment agreement.
- Organizational restructuring following a merger or acquisition can result in employees inadvertently becoming sidelined or overlooked and a failure to maximize their skills and experience.
- Risk of employees having previously been mischaracterized as contractors and associated liability.
- With successive transactions, it can become unclear when people started as employees if their position has evolved over time.



## Part 2: Employees you inherited

Employees whose history with the company is unclear - Steps to take now to avoid being caught off guard later

Maintain an up-to-date employee census.	Include start date, all compensation/remuneration details, position, jurisdiction of work, etc.
Where documentation is missing, provide new agreements for fresh consideration.	The agreements should recognize the employees original start date. The amount of consideration will depend on the individual facts.
Long term contractors or contractors who no longer meet the definition of contractor under applicable employment standards should be made employees/provided with employment agreements.	As with new agreements for existing employees, fresh consideration should be provided. Legal advice should be sought regarding which original service date may be applicable.
Conduct regular performance reviews.	This will allow the employer to maintain oversight of an employee's contributions to the Company, provide feedback to the employee, set goals and identify areas for improvement. It will also reduce the likelihood of employees being overlooked or undervalued during restructurings.



# Why didn't I get the job?

Colleen Hoey

# Why did I not the job?





# Hiring discrimination claims

## What we will cover

1. The legal test tribunals will apply in deciding non-hire claims.
2. An overview of the types of non-hire claims that arise, across jurisdictions and the remedies that could be awarded
3. Practical steps you will want to consider if you receive a complaint of discrimination in the hiring process.
4. Materials/evidence you will want to make sure you have, and retain for defending against a non-hire decision.
5. Best practices for avoiding and/or addressing non-hire claims.

# Discrimination in hiring claims across Canada

- There is human rights legislation in every province, and at the federal level which stipulates that it is a discriminatory practice, to directly or indirectly refuse to employ or continue to employ someone on a prohibited ground of discrimination.
- A review of the case law suggests the grounds for discrimination claims are varied and include discrimination based on age, sex, sexual orientation, marital status, ethnic origin and race.
- The allegations of discrimination arise at every stage of the recruitment process from advertisements, screening processes, the interview and communicating the decision.

# The legal test

The complainant must establish a *prima facie* case by showing:

- (a) that they have a characteristic protected from discrimination under the code;
- (b) that they experienced an adverse impact (i.e. were not hired or interviewed); and
- (c) that the protected characteristic was a factor (nexus) in the adverse impact.

Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

- Discrimination need only be one of the factors involved in a hiring decision for there to be a breach of the Code. In addition, it is unnecessary to prove that there was an intention to discriminate to support a finding that the Code has been violated.
- Decision makers will consider circumstantial evidence (discrimination is rarely overt).

# Complaints Re - Screening criteria

*Daniels v. Annapolis Valley Regional School Board, 2002 CanLii 78270 (NS HRC)*

- Daniels claimed the school board discriminated against her because of sex when it failed to consider her application for employment as a Maintenance Foreman.
- Board found that candidates with the same or fewer qualifications were short listed and interviewed for the position.
- Board was troubled by the employer's claim that she was screened out because she lacked school board experience when that same experience was not required for the successful candidate.

**Held:** The hiring process was tainted by discrimination. Daniels Awarded \$5,000 for injury to dignity



# Complaints re - Reasons for decision

*Vickers v. Pictou-Antigonish Regional Library, 1994 CanLii 18467 (NS HR)*

- Vickers alleged he was refused employment because of his sex.. He applied for two positions and was not interviewed despite previous experience working in a library. He claims less qualified women were hired.

## **The Board considered:**

- The library's employment manual regarding the selection process
- The advertisement for the position
- Evidence regarding the selection process
- Evidence regarding the successful incumbent
- Candidates written communication to the library

**Held:** The library did not discriminate based on sex but rather that he had been excluded because he did not have the requisite communication skills.

# Complaints Re - Interview questions

*Kartuzova v. HMA Pharmacy Ltd., 2012 HRTO 328 (CanLII)*

- The tribunal found that the prospective employer inquired about the applicant's code related characteristics during the job interview. i.e. questions about her marital status and how she had come to Canada.
- Tribunal also found that the employer (who had not retained a copy of the applicant's cv nor any notes about her interview) was unable to provide a non-discriminatory basis for preferring another candidate.

**Held:** The non-hire decision was tainted by discrimination and damages awarded.

# Language which gives Tribunals pause

**The following expressions or requests have been the subject of close scrutiny in the non-hire case law:**

- a) fit
- b) looking for someone more junior
- c) energetic
- d) over-qualified
- e) career potential
- f) request to bring a copy of their passport

# What the Tribunals found

- (a) **“fit”**: Although “fit” can at times be used to conceal discriminatory considerations, it is not necessarily so. Determinations with respect to “fit” must use objective and non-discriminatory criteria, and assessments must be based on actual characteristics and qualities, not presumptions and stereotyping.
- (b) **“looking for someone more junior”**: Age based discrimination - *Reiss v. CCH Canadian Limited*, 2013 HRTO 764).
- (c) **“looking for someone energetic”**: Tribunal did not ultimately find this to be improper but the language was closely scrutinized. *Gazankas v. Red Lake (Municipality)*, 2013 HRTO 198.
- (d) **“over-qualified”**: May be seen as neutral on its face but might adversely impact senior workers.
- (e) **“career potential”**: Was considered an age-based discriminatory factor in denying a promotion.
- (f) **“bring your passport”**: *Pedroso v. Westjet Airlines*, 2019 CarswellNat 3605.
- (g) all of the above.



# Damages

Where discrimination has been found, Tribunals have awarded:

- General Damages (loss of dignity).
- Lost wages that the person would have earned but for the discrimination.

## *Landry v. Vegreville Autobody, 2017 AHRC 19*

- The tribunal found Mr. Landry's race, sexual orientation and marital status were factors in the respondent's decision not to hire him.
- Awarded \$20,000 as general damages for loss of dignity and \$36,000 for lost wages.

# You received a complaint

## 1. Gather all potentially relevant information and respond to the allegation of discrimination:

- While most human rights legislation does not impose an express “duty to investigate,” in some circumstances, the Code is violated where an employer fails to take appropriate steps to respond to an employee (or prospective employee’s) allegation of discrimination.

## 2. Consider Motion to Dismiss

- Recall that the complainant has the burden of showing there is a connection between the adverse event (i.e. not being hired) and the protected ground. Employers have often successfully brought a motion to dismiss on the basis that there is no reasonable prospect that the complainant can prove, a connection between the protected ground (i.e. age) and the decision not to hire.
- Mere suspicion or belief, no matter how strongly held by the complainant, is not evidence upon which the Tribunal might find that discrimination has occurred.

# **Materials/ Evidence considered in non-hire cases**

(Materials you will want to keep)

- Job advertisement
- Statistics on number of applicants, number of people invited for an interview
- CVs of applicant, successful candidate and other short-listed candidates
- Evidence regarding the selection process for the short list (screened as they came in or wait until the close date)
- What criteria were used to screen applicants and why
- What Interview questions were asked and why
- Copies of notes from the interviews including scoring systems.
- Notes on why a particular candidate was selected over another
- Any additional correspondence with the candidate
- Employment Equity data - being able to adduce evidence of a diverse workforce may assist rebutting arguments that the employee's characteristics were a factor in the decision not to hire.) However, diversity does not insulate an employer from allegations of discrimination.

# Document retention for applications

	Mandatory Record Retention Period	Comments
Alberta	No Mandatory retention requirement in employment legislation	Generally, recommend 3 years
Ontario	3 years	WWA 4 - In force Jan 1, 2026
Quebec	No mandatory retention requirement	Generally, recommend 3 years
BC	No mandatory retention requirement	1-2 year - general limitation



# Best practices to avoid / Respond to claims

**Messaging around accommodation:** the Organization is committed to the success of its employees. If you require accommodation for any reason, please advise us at your earliest convenience.

**Avoid:** stipulating that Canadian Work Experience is required in job ad or in interviews

**Establish:** objective criteria for determining unsuitability or overqualification ahead of time.

**Articulate a rational:** screening measures and interview questions should all have a purpose i.e. assess technical skill, teamwork, self-discipline, professionalism, judgement, innovation, leadership.

**Consistency:** apply screening criteria consistently, develop a scoring system for interviews, use common questions.

**Record reasons:** concerns/ reasons for non-hire should be specific and particularized, not general and abstract.

**Retain documents** for the minimum time required by the province in which your employees are working.

## Gather only what you need



# Pension and retirement plan administrators take note

Barbara Walancik-Hatch

# BCFSA

## *NEW* Information Security Guideline for Pension Plan Administrators

- The **British Columbia Financial Services Authority (“BCFSA”)** is the regulator of provincially registered pension plans in British Columbia.
- **BCFSA’s Information Security (“IS”) Guideline** was previously updated in 2021 and applied to all Provincially Regulated Financial Institutions, including pension plans.
- A multi-phased consultation on a draft standalone guideline for pension plan administrators began in 2024.
- On March 25, 2025, the BCFSA released a *new* Guideline specifically for **Pension Plan Administrators (“PPAs”)**.
- The Guideline will come into effect on **July 1, 2025**.



# BCFSA IS Guideline for PPAs

## What is information security risk?

“Information Security (IS) risk includes unauthorized, illegal, or accidental use, disclosure, access to, modifications or destruction of data, or impairment of network systems (collectively referred to as information security incidents), which can cause serious harm to pension plan members.”

“The risk of unauthorized or illegal access to sensitive information or systems can come from employees, consultants, or external threat actors”

# BCFSA IS Guideline for PPAs

## *Data privacy vs. Data and system protection*

Data privacy is concerned with issues related to authorized collection, use and disclosure of information.

**VS**

Data and system protection (i.e. information security) focus on securing against unauthorized or accidental loss or misuse of data or information systems.



# BCFSA IS Guideline for PPAs

## Information Security Risk Management Program

- **Identify:** Information Security (IS) risks to systems, people, assets, data and capabilities;
- **Protect:** data and systems in a reasonable and appropriate manner using physical and logical security measures;
- **Detect:** IS incidents rapidly by establishing monitoring processes and periodically evaluating the effectiveness of the identified controls;
- **Respond:** IS incidents, including informing plan beneficiaries and members of material incidents;
- **Recover:** develop and implement appropriate activities to maintain plans for resilience, restore capabilities or service and comply with applicable legislation; and
- **Communication With the Regulator:** with 24 hours of determining that an IS incident is a material, a PPA should contact the BCFSA.

# BCFSA IS Guideline for PPAs

## Important to note

- PPAs will need to demonstrate that they have familiarized themselves with industry accepted practices for plan governance, including the applicable guidelines from the Canadian Association of Pension Supervisory Authorities (“CAPSA”)
- The BCFSA Outsourcing Guideline still applies.
- Appendices include:
  - Determining if an IS Incident is material.
  - IS Incident Reporting Information.

# Technology and cyber security

## Other jurisdictions

- **Federal** – Office of the Superintendent of Financial Institutions (OSFI): Technology and cyber security incident reporting Advisory:
  - Applies to defined benefit plans, defined contribution plans and pooled registered pension plan regulated by OSFI .
  - Effective as of 2023.
- **Ontario** – Financial Service Regulatory Authority of Ontario (FSRA): Information Technology (IT) Risk Management Guidance:
  - Applies to all FSRA regulated entities and individuals including pension plan administrators.
  - Effective April 1, 2024.

# CAPSA Guideline No. 10

## Guideline for Risk Management for Plan Administrators

- The **Canadian Association of Pension Supervisory Authorities (“CAPSA”)** is a quasi-regulatory association of Canadian pension regulators.
  - Mission is to facilitate an efficient and effective pension regulatory system in Canada, which it does through various mandates including establishing common regulatory expectations for pension plan administration across Canada.
- **CAPSA Guideline No. 10: Guideline for Risk Management for Plan Administrators:**
  - Released September 9, 2024 following two consultations with stakeholders.
  - Applies to administrators of defined benefit, defined contribution, pooled registered, target benefit and hybrid pension plans.
  - Where IT system changes or process changes are needed to support compliance with the 2024 Risk Management Guideline, such changes should be implemented by January 1, 2026.
  - CAP Guideline does not replace any legislative requirements but is designed to support legal compliance and the development of best practices.

# CAPSA Guideline No. 10

## Risk Management Program

- **Step one: Identify possible risks**

- Broad step that encourages seeking assistance from experts, including actuarial reports, relevant court cases and decisions and publications about external emerging factors that may impact the plan investments;
- Creating a risk register (template provided);

- **Step two: Evaluate risks**

- Develop a process for evaluating and prioritizing risks;

- **Step three: Manage risks**

- Develop mitigation strategies to manage risks (i.e. processes or procedures used to control the severity or likelihood of the occurrence of a risk such as implementing strict financial policies, developing contingency plans, seeking external audits from qualified professionals and/or obtaining insurance);

- **Step four: Monitor risks**

- Ongoing monitoring and evaluation, including, vigilantly update their risk registers and consider emerging risks as they arise.



# **CAPSA Guideline No. 10**

## Specific risks

- Guideline No. 10 also provides specific risk management considerations applicable to specific risk topics:
  - Third-party risk
  - Cyber security
  - Investment governance
  - Environmental, social and governance; and
  - Use of Leverage

# Thank you



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*Thank you for attending!*

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