

LABOUR & EMPLOYMENT QUIZ

Are you up to speed on mandatory retirement, employee e-mail privacy, and non-compete clauses? Test your labour and employment law knowledge with this quiz authored by WeirFoulds LLP lawyers Peter Biro and Carole McAfee Wallace.



1 Can you ask employment applicants if they have ever been convicted of a criminal offence or been in jail?
a) Yes.
b) No.
c) It depends on the applicable human rights legislation.

2 Does a worker who is injured in a workplace accident have the right to sue his or her employer for loss of earnings resulting from the injury?
Yes or no?

3 An employee has the right to privacy with respect to e-mail communications to or from his or her company e-mail account.
True or false?

4 Is a company policy that provides for mandatory retirement at age 65 allowed?
a) Yes.
b) No.
c) Probably not.

5 Are non-competition clauses in employment agreements enforceable against the employee after the employment is at an end?
a) Yes.
b) No.
c) Sometimes.

6 An employee who is terminated without cause is only entitled to the termination notice and severance pay set out in the applicable employment standards statute.
True or false?

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ANSWERS

1 (C) IT DEPENDS. It depends on the applicable human rights legislation. For employers in Ontario, or those subject to federal jurisdiction, human rights laws allow you to refuse to hire an employee with a criminal record for which there has not been a pardon. As a result, the appropriate question is: do you have a criminal record for which you have not received a pardon? Unless there has been a pardon, you can refuse to hire a person with a criminal record, even if the conviction was for a minor offence, years ago. A criminal record check can only be done with the applicant's consent. In Quebec, you cannot refuse to hire someone convicted of a penal or criminal offence, if the offence is not in any way connected to the job, or if the applicant has obtained a pardon.

For all other Canadian jurisdictions, you need to review the applicable human rights laws. For human rights statutes that do not state that a criminal record is a prohibited ground of discrimination, you may be able to ask these questions without offending the human rights laws. In some jurisdictions, the language of the human rights laws may allow the question only if the fact of such a conviction is related to the nature of the employment.

2 NO. While the workers' compensation regimes in each province and territory provide for certain exceptions in which the worker maintains a right to sue or to elect between suing and claiming accident benefits from the accident fund, the general principle is that a worker cannot sue his or her employer for losses arising out of the workplace accident. The historic bargain between labour and management — which was codified in the various workers' compensation statutes throughout Canada in the early part of the 20th century and which remains largely intact today — was one in which the employer agreed to contribute to a compulsory coverage no-fault insurance regime (i.e. a regime in which the worker no longer had to prove that the employer or one of its employees was negligent) in exchange for the worker relinquishing the right to institute civil proceedings against the employer.

3 FALSE. Although there can be a reasonable expectation of privacy with respect to e-mail communications in the workplace, such an expectation should never be assumed and is always a function of several factors, including any specific policies and practices that may be in place with respect to technology use. The e-mail account and the hardware and software are generally the property of the employer. It is generally assumed that communications using the company's technology can be monitored and controlled by the employer. An employee's reasonable expectation of privacy will be balanced against the employer's ownership rights in the technology, the employer's interest in ensuring the productive, loyal, lawful, and non-injurious conduct — including e-mail communications — of the employee, and the employer generally retains the ability to reduce the employee's privacy interest in his or her e-mail communications by implementing clear policies governing e-mail use and warning that communications are monitored.

4 (C) PROBABLY NOT. In all provinces and territories except New Brunswick, legislative exemptions permitting age discrimination in the form of mandatory retirement have recently been eliminated, or are currently in the process of being eliminated. Where elimination is completed, employees subjected to mandatory retirement policies will be able to successfully challenge the policy,

unless the employer can show that the specified age limit is a "bona fide occupational requirement" (BFOR). This requires employers to show that the age limit has a demonstrable impact on employees' performance of the job in question.

In New Brunswick, the Human Rights Code prohibits mandatory retirement policies unless the age limit is a BFOR, or it is contained in a bona fide retirement or pension plan.

The Canadian Human Rights Act, which governs federally regulated employers, permits mandatory retirement policies that are based on the "normal age for retirement" for the job in question. What is "normal" will be assessed on the basis of standards applied by employers in the same industry.

5 (C) SOMETIMES. The trend across the country is toward enforcement of reasonable non-solicitation and confidentiality clauses, and against enforcement of non-competition clauses for mere employees. Non-competition clauses are said to have the undesirable effect of being in restraint of trade. Moreover, courts will consider whether good consideration has been given by the employer to the employee for such post-termination restrictive covenants. Such clauses may, in some circumstances, be enforceable against senior employees who receive shares or stock options or other consideration in addition to wages as consideration for their covenant. In *Lyons v. Multari*, the Ontario Court of Appeal distinguished clearly between a non-competition agreement and a non-solicitation agreement and stated that, generally, a non-solicitation clause will provide adequate protection for an employer and only in exceptional cases will non-competition agreements be enforceable in the employment context.

6 FALSE. In the absence of an employment contract, an employee is entitled to common law notice for termination without cause. The common law notice period depends on a number of factors, including the employee's age and length of service and the character of the employment. The common law notice period generally exceeds, and therefore is inclusive of, the statutory termination notice requirements. Where there is an employment contract that provides for a specific notice period, that notice period will prevail (subject to concerns about the validity of the agreement more generally) as long as it is not less than the statutory notice requirements.

Remember, you cannot require an employee to give you a release for payment of statutory termination notice and severance pay, as these amounts must be paid to the employee in any event. You can, however, ask for a release for amounts paid over and above the statutory requirements.

YOUR RANKING?

2 or fewer correct: Poor. Time to hit the books.

3 to 4 correct: Not bad. Things must run pretty smoothly at your company.

5 to 6 correct: Excellent. You're an employee-management peacemaker.