

## Make sure policies comply with law of the land

Employment policies help employers clarify their expectations to their employees. Policies also help establish guidelines for dealing with day-to-day issues such as vacation, overtime, sick leave, and use of social media. Yet, these policies must be carefully drafted to ensure compliance with a number of overlapping employment-related statutes, including employment standards and human rights legislation as well as the common law. Moreover, with the changing jurisprudence, these policies can quickly become out of date.



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- 1** Your company has a short-term layoff policy for periods of seasonal lows. This winter, it decides to layoff three employees on a short-term basis for 14 weeks. Two of the employees accept the layoff. However, the third employee claims that he has been constructively dismissed and asks for separation pay. Does your layoff policy constitute constructive dismissal?

(A) Yes  
(B) No  
(C) It depends
- 2** Your company has an absenteeism policy which provides that employees who are absent for more than 10 days per year without prior approval are automatically dismissed. Does this policy comply with your obligations under human rights legislation?

(A) Yes  
(B) No  
(C) It depends
- 3** Your company suspects employees may be coming to work intoxicated in a safety-sensitive environment, but it has no proof. To address this issue, your company institutes a mandatory random alcohol and drug testing policy. Several employees complain this policy violates their privacy. Is your company allowed to carry out the policy?

(A) Yes  
(B) No  
(C) It depends
- 4** Your company has an unpaid internship policy. The policy provides that interns may be hired to assist staff for up to a six-week period and will receive an honorarium of \$200. Interns are to be recent graduates and may be offered employment at the completion of their internship. Is this program legal?

(A) Yes  
(B) No  
(C) It depends

**1** (C) It depends. Until recently, employers were not entitled to temporarily lay off employees under the common law, unless the employee's individual employment contract so provided. In the 2013 decision of *Trites v. Rennin Corp.*, the Ontario Superior Court of Justice held that a short-term layoff does not constitute constructive dismissal, so long as all the requirements of the Ontario Employment Standards Act, 2000 are met. Section 56(2) of the act sets out the requirements for a short-term layoff. As such, the legality of the layoff would depend on whether these requirements were met. That said, *Trites* is new law and there are a number of earlier cases that stand for the proposition that temporary layoffs can only be validly implemented if the terms of the employment relationship specifically allow them. Employers are best advised to build the possibility of short-term layoffs into their employment contracts if they wish to rely on that practice.

**2** (B) No. Under the Ontario Human Rights Code, employers have a responsibility to accommodate employees to the point of "undue hardship." If an employee is absent for reasons that are protected by the code, such as a disability or family status issue, then an employer is required to accommodate them. In most if not all workplaces, ten days of absenteeism will not constitute "undue hardship." In any case, employers first have an obligation to procedurally explore accommodation options. Therefore, this automatic termination provision is unlikely to comply with an employer's human rights obligations.

**3** (C) It depends. Previously, employers who worked in safety-sensitive environments were entitled to randomly test for suspected drug and alcohol use. However, in the 2013 decision of *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, the Supreme Court of Canada held that such random testing is only permitted where an employer could demonstrate "enhanced safety risks." In that case, the employee worked in a paper mill, which was undoubtedly a dangerous work environment. Yet, only eight instances of alcohol consumption on the job had arisen at the mill over a 15-year period,

which was not enough to justify random drug testing. Before considering the implementation of a random testing policy, employers must now ensure they have "enhanced safety risks," such as significant instances of intoxication on the job, a dangerous incident in the workplace due to intoxication, or an identified substance abuse situation. Additionally, if employers operate in a unionized environment, the better approach is to negotiate the implementation of a drug and alcohol testing policy with the union as part of the collective bargaining agreement.

**4** (B) No. Unpaid internships, though ubiquitous, are generally illegal in Ontario. The Ontario Employment Standards Act, 2000 provides that all employees are to be paid minimum wages. Interns are not excluded from the act. Unpaid internships are only legal where the following six criteria are met:

1. The training is similar to that which is given in a vocational school;
2. The training is for the benefit of the intern;
3. The employer derives little, if any, benefit from the activity of the intern while he or she is being trained;
4. The training does not adversely affect another job or position in the workplace;
5. The employer is not promising the intern a job at the end of the training; and
6. The intern has been told he or she will not be paid for their time.

The Ontario government is in the process of introducing new laws that will affect the legislative scheme of unpaid interns in a variety of ways, including with respect to health and safety issues.

### YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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