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# Workers' Compensation Newsletter

*"Not for Employers' Eyes" - WSIB Policy Development & Implementation*

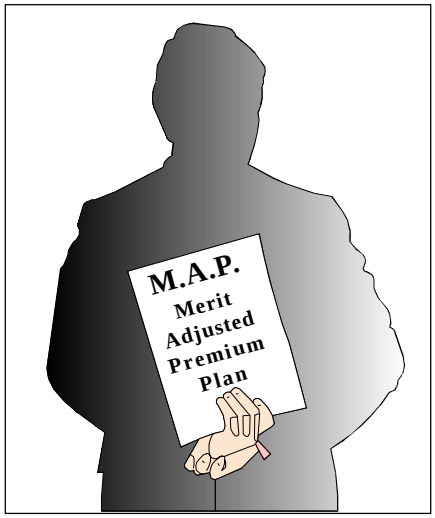
# The Growing Cult of Secrecy at the Workplace Safety & Insurance Board*

*Fink & Associates* prides itself on keeping abreast of future and current policy developments at the Workers' Compensation Board (as of Jan. 1, 1998, the Workplace Safety & Insurance Board). Until 1997, this was relatively easy as the Board routinely made available policy proposals and the working papers behind them. The Board was compelled to do this because of the tripartite nature of the Board of Directors which tried to be inclusive of all stakeholder's concerns. While the tripartite system failed due to poor Board leadership, giving employers some indication of where the Board is heading remains today an appropriate means of conducting Board affairs given that the Board is entirely funded by 200,000 employers in the province.

Instead, the Compensation Board is now a monolith which is either purposefully masking its policy initiatives, or out of organizational confusion passing a plethora of policies in secret, which are sprung on employers as 'fait accomplis'.

### In Camera Strategic Directions:

On June 11, 1997 the Workers' Compensation Board's Board of Directors passed a Board Minute entitled **"Improving Return to Work: Enhanced Employer and Worker Self Reliance".** This document is called a "Strategic Direction", and there could not have been a more important paper for employers' interests ever adopted by the Board, short of closing the place down. Yet, **"Improving Return To Work**..." is a policy document that the WSIB has neither publicized nor distributed to its stakeholders or the general public. This article will start with analyzing a multitude of such 'underground' policies and Board position papers.




The passing of a Board of Directors 'Minute' is necessary either in relation to a Policy Guideline or a significant internal operational matter. If the *Workplace Safety & Insurance Act* is the frame of the monster ocean liner known as the Workplace Safety & Insurance Board, then Policy Guidelines are the cladding of the hull. Although several Policy Guidelines are passed per year, they remain few and far between. For instance at the June 11, 1997 Board of Directors Meeting no other Board Minutes were passed.

The **"Improving Return to Work... "**Strategic Direction is neither a Board Policy nor an internal operational matter, but rather a bit of both. The most significant change in the new workers' compensation legislation, Bill 99, is in my opinion the new obligation of employers to return injured workers to work whatever the circumstances. It is speculated by my-

**(Continued next page)**

## IN THIS ISSUE



*On January 1, 1998, the Workers' Compensation Board of Ontario was renamed the Workplace Safety & Insurance Board.

self, that when Bill 99 received first reading in the Legislature on November 26, 1996, senior management at the WCB commenced to turn its attention on how it would interpret the section 40(1)(b) of Bill 99 which reads as follows:

*The employer of an injured worker shall co-operate in the early and safe return to work of the worker by attempting to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings.*

This section leaves plenty of room for interpretation, not the least of which are the following questions:

- what is the meaning of "available"?
- what resources will employers have to draw on from the WSIB to assist them in creating "suitable employment" ?
- what happens if the employer refuses to co-operate with providing "suitable employment"?
- is "co-operate" a euphemism for creating a job which does not yet exist, with minimal future productivity gains for the employer?
- what are the penalties for non-compliance?

### The Board to Employers: Pay Your Alimony and Butt Out:

Some of these questions are answered in the **Improving Return to Work** Strategic Direction passed in June. In actuality this " Strategic Direction" is a first draft of Regulations which will govern the laws employers must abide by on this crucial topic. But more than just being a first draft, it is the new law just as an adolescent is an adult: the die is cast, now the parent must wait for the final details to be worked out. It is unfortunate that the Compensation Board has cast the employers of Ontario, particularly small employers which don't have the political muscle of *General Motors*, to play the role of fathers estranged from their family by divorce proceedings, ie.: pay your alimony and butt out of the child rearing.

The following is a summary of the framework which is being heralded by the **Improving Return to Work** Strategic Direction:

- "Certified Services": If you are an employer of 200 employees or less, you probably don't have a human resources manager with specialized ergonomic training in designing work descriptions and stations for the disabled employee. If you are met with the challenge of providing such, the employer might wish to go to an outside consultant. The Board intends to certify which consultants the employer might use. These consultants will be provided for and paid by employers, unless the employer refuses to provide them, in which case the employer will be fined. (From the paper it is assumed the fines can only be avoided where the worker is being returned to work outside of the accident employer's place of work.)

- The WSIB expects workers and employers to handle return to work activities without WSIB initiation, ie.: no fitness notices; no caseworkers; no ergonomists; no adjudicators spelling out what the worker's restrictions are. Will this lead to the independence and streamlining of return to work procedures or endless trips to hearings to iron out differences of medical opinion regarding medical restrictions and ergonomic factors which must be taken into account?

- The employer can ask the WSIB to pay for a Functional Abilities Evaluation. This will help, but will it be a York Finch Hospital "cheapy" that the Board will pay for but which helps little, or a full blown $900 job that can be relied on?

- The work must be productive and maintainable. Does this mean their must be a job already in existence and waiting to be filled, or must the employer create such a job or push out a non-disabled worker from an existing job? ( The $300,000 s.40 cooperation penalty question.)

- The Board will mediate disputes.

- The Board will do research on return to work practices. (But will they share it with the public?)

### $300,000 Employer Penalties Adopted at the Wave of a Wand:

As noted in the acccompanying Newsletter article, concerning the Board's recently published Policy Framework (October, 1997), entitled **"Return to Work/ Labour Market Re-Entry"**, most of the same policies from the **Return to Work** Strategic Direction are merely reproduced. However, an additional piece of the puzzle was provided in October. The Board has set penalties of up to $300,000 for employers not complying with their responsibility to make available modified work no matter what the cost of its provision.

The prototype for the January 1, 1998 *Workplace Safety and Insurance Act* Regulation was set by the June 1997 Strategic Direction. Our law firm complained loud and hard to the Board and the Minister that it was inappropriate that employers were given only 3 weeks to comment on the Policy Framework, when its effects were far reaching. After reviewing the Strategic Direction, the reason for the 3 week time period is clear: the Compensation Board had by June secretly adopted all of its **return to work** strategies, and the opportunity to comment on the Policy Framework is merely window dressing.

### Where Is the Voice for Small Employers on the WSIB Board of Directors?

While WSIB bureaucrats generally consider that they are a law unto themselves, what initiatives are coming from other Board of Director members, being paid healthy stipends to meet and decide these issues monthly? At the June 11th, 1997 meeting of the WCB Board of Directors one of the Board members suggested that the WCB "measure progress on achieving success measures and to reflect this in performance evaluations". This is a great idea but doesn't appear to have been adopted to date. And aside from this one comment it is rarely indicated whether the current Board of Directors, charged with guiding the WSIB are little

more than an audience for the Chairman and the bureaucrats; certainly very little of substance or opposition emanates from them.

Board Member Dr. Stewart suggested at the May 8, 1997 meeting of the WCB Board of Directors that a stakeholder council would be useful. Chairman Glen Wright squashed that idea by countering that "industrial sectors" will facilitate consultation on an industry basis. This is a conclusion that is utterly ridiculous. The industrial sector reorganization of the WCB has nothing to do with consultation or making information available on proposed policies, but rather is strictly an adjudicative framework. Not unless of course "consultation" in Chairman Wright's vocabulary means to tell employers what the Board's doing, after its done it, and turn a deaf ear to any criticism.

## WSIB Quarterly Financial Reports Discontinued

In deference to the muted Dr. Stewart, the May 8, 1997 Board of Directors minutes state: "The strategic direction for consultation will be discussed again at the June meeting". At the June meeting of the Board of Directors, Chairman Glen Wright indicated that a strategy for consultation should be in place by September 1997. Four months later the consultation paper is not ready, and it is not expected that the WCB will consult with its constituencies prior to dictating what consultation it will tolerate. Chairman Wright's consultation strategy consists of asking employers whether they want red or white carpeting, and "leave the rest to me". Now employers can no longer (since April 1997) receive Board quarterly financial information, a traditional means of marking Board performance for the past 4 years, lest some disturbing trends come to employers' notice.

## Prying Out Board Secrets:

The following are a list of "secret" documents currently being with held from public view, relating to new policies adopted and to be adopted by the WSIB. An explanation of the relevance and importance of each document accompanies each description.

**1. New Industries to Be Covered by the W.C.B (The Revenue Branch Coverage Paper)**

Notwithstanding the unparalleled expansion of the Ontario economy in 1997, revenues received by the WSIB continue to shrink, according to the latest published quarterly financial results (1stquarter, 1997). This fall in revenues is not only on account of the 5% assessment rate decrease ordered by the Minister of Labour for 1997, but also that a great deal of the Province's job creation is taking place outside the confines of WSIB covered industries, such as the financial services sector.

The WSIB is aggressively pursuing a plan to include all Ontario industries within the mandatory coverage provisions of the new *Workplace Safety and Insurance Act.* This was a suggestion previously made by the Ministry of Labour in the last proposals regarding WCB reform. Because of widespread opposition when the universal coverage proposal last came to light, the Board's agenda must remain secret - don't let the news of mandatory coverage leak out to such trade associations as the Canadian Bar Association: lawyers may not appreciate Workwell Auditors tramping through their offices.

Secondly the Board must sweeten the pot for the banks, who would assume a great deal of financial exposure upon shouldering mandatory inclusion inside the workers' compensation system. Banks have been lobbying the Government against these proposals.

Our law firm's request for access to a copy of this paper remains outstanding for 3 months.

**2. Defining What is a Worker or an Independent Operator - A Paper Prepared by the Revenue Branch.**

At the Board, chaos reigns supreme on the issue of who is a worker and who is not. The construction industry and even more prevalently, the trucking industry, have over the past 3 years attempted to remove their workers from the confines of the workers' compensation system. They have been able to accomplish this by changing the status of their employees from 'workers' to 'independent operators'.

Under heavy pressure from the *Ontario Trucking Association*, the Compensation Board abandoned its jurisdiction to decide who is a worker and who is excluded from the mandatory coverage of WSIB. The Board now only requires that a worker sign a form agreeing to become an 'independent operator' and the employer is released from WSIB liability. What has transpired is that a large sector of the trucking industry's work force is left without any disability insurance coverage, the very thing which workmen's compensation legislation was supposed to prevent when introduced 80 years ago.

Furthermore these 'independent brokers', devoid of coverage, are rarely either 'independent' or 'brokers'. They generally perform work exclusively for one company, and at the virtual direction of that company. Many appeals are now before the Board wherein the brokers are claiming to be 'workers' on the basis of their lack of control over their working environment, and the economic duress which forced them into signing the Board's 'independent operator agreement' forms. Not only does this situation add to the Board's unfunded liability and uncertainty, it thwarts adequate worker rehabilitation.

Our law firm's request for access to a copy of this paper remains outstanding for 3 months.

**3. New Experience Rating Plan**

Our office wrote to the Compensation Board in July 1997 asking for copies of any paperspertaining to changes to the current NEER experience rating system. The February 12, 1997minutes of the W.C.B. Board of Directors meeting indi-

cated that Chairman Wright was working on an interim strategy to make the Experience Rating Program prospective. The Compensation Board responded to our request by stating that no such paper existed.

Two months later the Board removed 70,000 employers from the NEER Plan and placed them into a new experience rating system, beginning in 1998, called "MAP" (Merit Adjusted Premium Plan). Our office has tried unsuccessfully to obtain the working paper which was used to develop the MAP and we have been repeatedly told none exists. I suppose Chairman Wright came up with this scheme on the back of a napkin during a Board of Director's lunch at the 200 Front Street Mausoleum. We have now requested a copy of the working paper (or napkin) under the Freedom of Information Act.

MAP is one large premium grab from small employers, or to quote from how the Board refers to MAP in its until recently secret overhead projector slide show: "MAP will provide meaningful financial incentives, consistent with insurance needs".

**The highlights of the MAP are as follows:**

- 70,000 small employers with annual WCB payments of less than $25,000.00 are included.

- each accident costing the WCB at least $300 will be charged on average, as a $1500 penalty against the employer.

- surcharges can amount to penalties of up to $12,500 per year, every year. Fatalities will be penalized at up to $6,250.00 on top of Ministry of Labour fines, even in the absence of dependents on the part of the deceased.

- the WCB's computer doesn't yet have all the kinks worked out of it to produce MAP penalties, such was the rush to implement it!

- even if an employer has paid a penalty for a claim in 1995, the employer will pay an additional fine for the same claim in 1998.

- the Board claims the MAP is "prospective", in other words it looks at how much money an employer's claims will be costing the Board in future years. There is nothing prospective about it, rather it is a system that tells employers, that if you have a work accident, don't tell us about it: take care of it yourself. MAP will encourage massive employer fraud in terms of under-reporting lost time accidents. A worker can be paid to stay home for 3 weeks at half the cost of a WCB fine.

The construction industry has a similar fraudulent milieu going on currently, on account of the CAD VII experience rating plan enjoyed by construction employers. CAD VII uses the number of yearly accidents as a factor to penalize companies. Any employer who doesn't cheat receives massive fines in the tens of thousands of dollars.

- the introduction of MAP is a project originating with large employers and the WCB bureaucrats who have for the past 5 years, with the ill-fated 1994 *Financial Incentives Package* being the most notorious failure, been trying to accomplish the following:

**a.** get rid of second injury fund relief by making claim costs irrelevant;

**b.** have small employers flip for more of the WCB bill. Employers with over 500 employees, who currently rake in 75% of the $300 million of experience rating rebates given out annually by the WCB, while paying less than 15% of the assessment, want to get their hands on more;

**c.** take away the incentive for employers to watch over how the WCB manages claims, but rather turn the onus back onto employers to re-employ injured workers or face hundreds of thousands of dollars of penalties (see the article on the new *Workplace Safety and Insurance Board* Regulations in this newsletter).

For Board bureaucrats this means they will have less work to satisfy employer demands which they never have, and with the current WSIB management policies, never will be able to satisfy anyways. For the larger employers, who can suck into their operations injured workers of every ilk, and make the new dedicated industry adjudicative sectors (eg.: there are now WCB adjudicative offices for big mining, big steel, big auto, etc.) captive to individual companies by intensive and professional in house employer representation, everything looks rosy. Small employers have lost the "insurance" factor in the new *Workplace Safety & Insurance Act*, and would be farther ahead self-insuring.

**It's no wonder that the Compensation Board didn't dare give small employers any warning of the MAP system notwithstanding the Chairman's pronouncement on March 6, 1997: "consultation with the employer community would be essential to review proposed changes to the experience rating model"!**

**4. The Aetna Fraud Plan**

The WCB paid the Aetna Insurance Corporation $97,000.00 to come up with some proposals to combat fraud. The Board meanwhile has received from its staff and employers dozens of proposals to deal with fraud such as hiring private investigators. But of course, with the current Board management having little or no background in managing a disability insurance system, some overpriced experts needed to deliver a seal of approval to some very basic premises such as prosecuting all staff engaged in fraud and establishing a 1-800 number.

Our law firm's request for access to a copy of this Aetna paper remains outstanding for 3 months. Meanwhile the Board has lined up fraud investigators but has not yet used them. It has several employees under suspicion, but not yet charged them (as of October 15th, 1997). What is the WCB waiting for - another $97,000.00 report; or another $100,000,000 into the pockets of criminals?

***(Continued on page 10)***

*Submissions by **Fink & Associates** to the Minister of Labour and the WCB*

# Proposed Policy Framework - Bill 99, the *Workplace Safety & Insurance Act*

**In late October of 1997, the WCB proposed a series of Regulations which would have a far reaching impact on how the new *Workplace Safety & Insurance Act* would be interpreted to apply to benefits and employers' obligations: return to work, duration of worker supplements, calculation of pensions, calculating earnings etc. Companies were given only a little more than two weeks to comment. As of the end of 1997, there has been no further word from the Board on what the final draft will look like or opportunity for further input from the employer community. The Board's actions are scandalous given that these Regulations will shape the future of the $11 billion unfunded liability and are worth hundreds of millions of dollars annually to employers.**

**November 19, 1997**

*On behalf of the Employers' WCB Crisis Committee and numerous WCB stake holders, I must strongly protest the inadequate time provided to conduct an analysis of the proposed policy framework. The extremely short time frame (less than two weeks) excluded any opportunity of consulting with my clients regarding their views and recommendations. I am providing to you my preliminary observations and recommendations.*

**Obligation to Re-employ**

A key parameter within the employer's obligation to re-employ disabled workers remains obscure and unknown, even after a careful examination of the statute and the October 14 1997 policy framework. More particularly, the meaning of the word "available " remains ill defined. Please consider the following:

Section 40 (1)(b) of Bill 99, as amended at second reading, requires the employer to attempt to provide a suitable employment that is "available".

Section 41(6) requires the employer to offer the disabled worker the first opportunity to accept suitable employment that may become "available".

At page 4 of the Policy Framework document Return to Work/ Labour Market Re-entry the obligation is to "accommodate the worker in suitable employment as soon as possible..."

At page 10 of the Return to Work/ Labor Market Re-entry document an example is given as to when a worker cannot be accommodated legitimately, and without penalty assessed to the employer: "the accident employer is a small business and accommodations required to the Workplace will cause financial hardship".

Section 41(6) commands the employer to accommodate the work or the Workplace to the extent of assumed costs just less than a financial hardship.

The dictionary definition of "available" is 'that what can be used or secured'. Within the meaning of the word "available" is not included the criteria that the thing to be secured or used exists in its present form, but rather that what does exist could be fashioned as "available".

Will the employer be required to provide a job to a disabled worker which does not presently exist, even with modifications, to a current job?

Will the employer be required to extract from existing jobs and job requirements a replacement position which meets the disabled worker's restrictions?

Will the employer be required to provide modifications to existing jobs or subsets of existing jobs in a newly created/disabled worker job, short of financial hardship?

How does the Compensation Board intend to define "financial hardship"?

Does the Board intend that financial hardship should be equated with a hardship that would render the company insolvent?

Will the employer be required to remove a worker from the work force to make way for the injured worker performing a newly created job?

Will the employer be required to make a new job available for the disabled worker even if the productivity that can be expected from the new job is below the standards of other workers? Does it matter whether or not the job is performed to its maximum potential by the disabled worker?

How long does the obligation to maintain the job continue? Does the word "co-operate" in S.40 mean an indefinite obligation, or can the employer rely on the time limit in S.41 of two years?

In my opinion, the Board must firstly adopt a clear definition within the Guidelines as to the required degree of effort mandated for employers in accommodating disabled workers. Secondly, it is suggested that the duty of accommodation be no greater than providing work that is both "productive" and "available". Thirdly, the term "financial hardship" should be defined to mean that the financial consequences of providing and accommodating the disabled worker not outweigh the productivity benefits of the worker's labour in performing the job so found.

The *Ontario Human Rights Commission's* interpretation of "financial hardship" which employs a test whereby employers must expend funds and energy short of threatening corporate financial viability, should be rejected. Otherwise, the Province of Ontario is about to create an army of workers whose only reason for employment is nothing more than the statutory compulsion employers are under to provide same. This economic trauma to employers will abruptly end as soon as the legal obligations to the Workplace Safety and Insurance Board and other statutory schemes have subsided, leaving this army unemployed. I was previously assured by a representative of the Ministry of Labour that a draconian 'make work' scheme was not intended within Bill 99.

Page 8 of the Policy Framework document **Return to Work/Labour Market Re-entry,** provides that the penalty for employer non co-operation with the terms of section 40 (the employer co-operation section) is a penalty to the employer of one hundred percent of the disabled worker's loss of earnings benefits plus the cost of providing a labor market re-entry plan, plus finally, the re-employment penalty pursuant to Section 41. The individual claim costs for a loss of earnings often exceed three hundred thousand dollars! Such a cost would bankrupt many companies and cause irreparable harm to smaller ones. A set of directives allowing for a percentage of such a fine to be levied depending on the circumstances of the case, and the size of the company must be formatted. Examples of causes that will succeed for a reduction in penalty should be provided as non exclusive examples. If the Board wants to state to Ontario employers: Either you take back to work every worker with every partial disability, or the Board will close your business, then the Board better state this up front immediately, allowing Ontario's employers to decide whether they can afford to remain in business in this province.

I might add that this penalty provision is out of sync with section 41(6) which only requires accommodation to the point of financial hardship, and not beyond.

Currently, the penalty under Section 54 of the *Workers' Compensation Act* can be modified by a an adjudicator to be less than one hundred percent on account of mitigating circumstances or a partial accommodation. Surely a company that re-employs an injured worker for 11 months, should not be treated to the same penalty as an employer who had only employed the disabled worker for one week.

It is suggested that penalty moderation be given some direction in the guidelines.

If the Board is serious about an incentive program to offset the proposed draconian cost of failure to accommodate and the corresponding cost of accommodation it must propose a discussion immediately. Those guidelines cannot wait six months from now when the obligation is already upon employers. Otherwise employers will be left with the obligation but no financial measures or resources to provide for it.

The most difficult workers to return to work are those with chronic pain. Although appropriate treatment of these workers is subject to a Board study sometime off in the future, there needs to be a framework for treatment now.

**Labour Market Re-entry and Loss of Employment Earnings Benefits**

Workers who are re-employed by their accident employer, but then become unemployed for reasons unrelated to the work related injury, e.g.: Plant layoff or closures, may be assessed for a labor market re-entry plan and

execution, depending on the degree of impairment, transfer of skills and chances of re-employment.

Why should not the same opportunity be provided to disabled workers who suffer the same fate following their first labor market re-entry plan? For example, if a disabled worker following the first labor market re-entry plan, but subsequently loses her/ his job due to the fact for example that lab technicians are a job category no longer in demand, would not that disabled worker be entitled to at least further consideration for a labor market re-entry plan?

What differentiation is there between an employee five years post accident who was subsequently employed with the accident employer and now requires further assistance, and the employee who is objectively compromised from successfully re-entering the labor market, also five years post accident, but who was re-employed initially and subsequent to the accident pursuant to a labor market re-entry plan?

If the first labor market re-entry plan fails to return the worker to employment or even if it does return the worker, but only for short time, it appears unfair to restrict any further labor market re-entry executions. Since when does the Board having a perfect track record while pursuing past aspects of their statutory duty, which it has undertaken? Within the 30 day time limit afforded to disabled workers to appeal the labor market reentry decisions of the Board, does the Board now expect that each such decision will be executed with sufficient foresight and competence so as to never afford a disabled worker a second opportunity to overcome economic consequences of his disability? No other group in society other than disabled workers are presented with a career choice that must be decided within so short a time as practically one or two months.

Section 42 of Bill 99 requires the Board to provide a labor market re-entry plan when certain criteria are met. There is no indication that the worker is limited to one plan. By adopting the guidelines in the proposed format contained in the policy framework, the Board is fettering its discretion, provided to it by the statute. Fettering discretion is contrary to numerous court decisions dealing with similar examples and contrary to adopting decisions based on the real merits and justice of the case.

Ill treatment of injured workers does not further the interests of employers, but rather leads to protracted litigation, unforeseen results, and the later counterbalancing of the statute causing further dislocation.

Cancelling the loss of employment payments to a worker if he does not respond to the final review process is a draconian penalty that could be caused by something as innocent as a failure of communication, particularly in an age of direct bank deposits. A far more appropriate remedy would be suspension, and will avoid protracted legal and political disputes.

**Earnings Basis**

When trying to determine the wage basis for injured workers following periods of short-term employment, the Board proposes to look at past earnings for two years. While the policy framework indicates that the Board will consider earnings obtained while working for such institutions as banks, which are not covered by the Safety and Insurance Board, it will not consider as earnings proven self employment income, unless such income was insured with the Board. This provision makes no sense. Proven earnings are proven earnings and all should be considered.

**Conclusion**

In a democracy, laws are not proclaimed without an adequate opportunity for public comment and debate. The time I have been provided to make comments on these crucial policy initiatives has left no opportunity for consultation with my clients.

The citizens of democracy cannot be made subject to penalties without first receiving adequate knowledge of what constitutes a crime. I suggest that the current policies being promoted have not been adequately thought out or conceived, nor have employers been given sufficient clarity of what the policies will mean, or opportunity for comment. The Board must suspend the implementation of such policies until these deficiencies are corrected.

# Terminating Non-union Employees: Look Before You Leap

**by Kevin D. MacNeill**

Employers must consider the issue of employee termination prior to hiring, during the employment relationship and at the time of firing or there may be a negative impact on their bottom line. Moreover, employers must consider potential termination situations in light of practical concerns such as business reputation and legal costs.

The employer-employee relationship is fundamentally contractual. Collective agreements govern unionized workplaces while in a non-unionized setting, individual employment contracts define the employer-employee relationship. Employment law for unionized and non-unionized workplaces is similar but sufficiently different to warrant different considerations. For space reasons, this article will look at the non-union workplace, which is the setting in which most Ontario employers and employees find themselves.

Individual employment contracts may be verbal but will preferably be in writing. To be binding, an employment contract must comply with applicable legislation. A clearly and professionally drafted employment contract helps reduce potential misunderstandings as to what will happen at the termination of the employment contract. The employment contract should set out the conditions under which it may be terminated and the compensation payable, if any, from one party to the other in that event, notably where the employer dismisses the employee. Written employment contracts are also valuable in defining ongoing obligations which an employee may have to the employer subsequent to termination of the contract such as confidentiality and non-competition obligations.

Where there is no written contract, costly and uncertain litigation may result. Then issues pertaining to the termination may be resolved by an unknown and unpredictable third party according to the judge-made common law of employment or applicable employment standards legislation.

In a nutshell, the common law of employment is that where an employer wishes to terminate an employee, it may do so without financial obligation to the employee and without advance notice of the termination where "just cause" exists. If there is no just cause, the employee must be provided reasonable advance notice of the termination or payment in lieu of the notice.

There is no precise legal definition of what amounts to "just cause" at law. However, some of the clearest examples would include such employee misconduct as theft or intentional damage to an employer's property or reputation. Less serious matters such as substandard employee productivity or habitual lateness generally do not amount to just cause unless the employee persists in these activities in the face of repeated warnings, progressive discipline and despite being given a reasonable opportunity to improve behavior.

Employers faced with problem employees should take care to document in detail: all instances of employee infractions; warnings and discipline given to the employee; and, measures taken by the employer to help the employee achieve desired levels of performance. It is also a good idea to have two or more employer witnesses present for these steps. If termination of an employee is contemplated as a result of a series of minor infractions, such as habitual lateness, giving the employee a written last chance warning is desirable. Here it should be made crystal clear that further infractions will result in termination. Not making an employee aware that his or her job is in jeopardy prior to "the straw that broke the camel's back", will later render more difficult the task of proving just cause.

Where there is no just cause and the only real issue is how much advance notice of termination or payment in lieu of that notice is owed by an employer, the courts have historically considered many factors in deciding the issue. However, the most important of these generally have been the employee's age, length of service, level of job responsibility, and level of salary. While not carved in stone, as a rule of thumb, consideration of these factors has historically led courts to award employees dismissed without just cause and without notice an amount of one month per year of service.

In the case of applicable employment standards legislation, the amount of notice of termination or payment in lieu of that notice will generally vary according to the employee's length of service and the size of the employer. While employment standards legislation

sets out precise employee entitlements, as a rule of thumb, it is generally one week per year of service in the case of shorter term employees and two weeks per year of service for longer term employees who work for a larger employer.

Employer common law liability may be reduced by such things as workers' compensation or insurance plan disability benefits received by the employee during the notice period. Further, employer liabilities may be reduced by any money the employee receives during the notice period from alternative employment. Further, they may be reduced or eliminated if an employee makes no attempt to find alternative employment or otherwise cut the losses connected to being dismissed. It is therefore desirable to help terminated employees find alternative employment. Where the risk of referring a problem employee is too high, employers should still keep a file on available alternative jobs, containing ad clippings and so forth. These measures will reduce potential liabilities, especially in the event of litigation.

Workers' compensation and human rights legislation also present a veritable minefield for employers considering terminating employees who are entitled to protection under this legislation. For example, in the case of an employee with service of one year or more at the time of suffering a workplace injury, the employer may have reinstatement obligations for up to two years after the accident under Ontario workers' compensation legislation. Failure to comply with these obligations may lead to a penalty on the employer of up to one year of the employee's net average earnings for the year proceeding the injury and, the employer may also be required to make payment to the employee for up to one year as if the employee were entitled to workers' compensation benefits. In addition, by virtue of these penalties, some employers may suffer a worsened experience rating at the Workers' Compensation Board and thereby incur increased costs.

As another example, under applicable human rights legislation, where an employer terminates an injured or handicapped employee prior to attempting to accommodate that employee by offering modified work duties, further liabilities may be incurred. In such cases, employers are potentially liable for full compensation to the employee, which may amount to more money than would otherwise be due at common law or under applicable employment standards legislation. Further, employers who are found to have effected a discriminatory dismissal face an extra damage award of up to $10,000.00 and cancellation of government contracts. Added to this, human rights proceedings are typically quite protracted and may involve considerable legal costs.

There are other pitfalls of which employers should be aware, namely the doctrine of "constructive dismissal" and potential liabilities for such items as punitive damages, mental distress damages which an employee may seek arising out of his or her dismissal.

Broadly defined, a constructive dismissal may occur when an employer fundamentally modifies the terms of the employment contract without the consent of the employee. Examples would be a radical reduction in an employee's salary with no corresponding reduction in job responsibilities or a significant increase in job responsibilities without a corresponding increase in compensation.

Where a constructive dismissal has occurred, an employee may quit employment and seek the same amount of damages as in a case of dismissal without just cause. Potential liabilities may be reduced by providing employees with credible reasons for changes in the terms of their employment contract, involving employees in a process of negotiation with respect to the proposed changed terms and giving employees reasonable advance notice of the proposed changes. As well, employers may broadly define job descriptions in employment contracts at the outset of the employment relationship. This will reserve room for the employer to modify the employee's job responsibilities during the life of the employment relationship.

If an employee is terminated in a callous or highhanded fashion an employer may also be on the hook for punitive or mental distress damages. Accordingly, care must be taken to treat terminated employees with dignity. Terminations should not be broadcast to the whole workplace, but should be carried out in private in a respectful manner.

While some of the most common potential liabilities arising from employee termination have been sketched out here, employers should not lose sight of the fact that there are many others. Seeking the help of a lawyer who practices in the area of employment law prior to any employee termination will pay dividends: the hundreds of dollars employers invest in solid employment contracts and defensive advice may well avoid tens of thousands of dollars in legal fees before the courts.

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## The Growing Cult of Secrecy

*(Continued from page 4)*

**5. The Implementation Plan for Workplace Safety**

The WCB, now known as the Workplace Safety & Insurance Board, hired a former air force commander, Brock Horseman, to run its workplace safety wing. The Board will now be charged with accrediting and inspecting employers' operations. The implementation plan was drafted by March 5, 1997 and was supposed to be presented in its final form by June 1997 but to our knowledge hasn't.

It is feared that all employers will over the next 12 months come under the rigid penalties and futility of a *Workwell* Audit (see *Fink and Associates Newsletter*, vol. 10, no. 1, January, 1997).

The exact format remains a fog waiting to envelop employers without notice or warning.

Our law firm's request for access to a copy of this paper remains outstanding for 3 months.

**5. Consultation Strategy**

Chairman Wright promised this strategy would be ready by September 1997 (May 8, 1997 Board of Directors Minutes).

**6. Delegation of Statutory Powers and Duties Document**

Under Bill 99, the *Workers' Compensation Appeals Tribunal* loses its power to over-ride WSIBpolicies. Section 126 renders Board policies inviolate from Appeal Board review. The Government included this section on the urging of WSIB bureaucrats who have consistently seen their poorly thought out policies rejected on appeal by the Appeals Tribunal. Many employer groups were vociferous in trying to defend the Appeals Tribunal's initiative because it has been employers who have been the net beneficiaries in a myriad of areas such as second injury fund relief, experience rating, rate groups, return to work obligations, etc. Indeed, the Board has relied on the reasoning of WCAT decisions to create its new policies.

The change in the law was a deliberate attempt by the Government and large employers to thwart the needs of small business, to eliminate a forum that could lift the yoke of the bureaucracy from the small employer's back and as a way of raising revenues.

When the Appeals Tribunal, after January 1, 1998 bumps into a Certified Board Policy it must submit its dilemma to the WSIB which then has 60 days to make an answer. Lost in this process is the right of appellants to have their plea heard by the Board prior to making a decision or confirming Board Policy. This is the worst kind of star chamber procedure straight out of the Middle Ages. No longer will a company that is being screwed by the Board have an opportunity to plead its case before the Board Officials (the Board of Directors), with the power to grant an exception to the Policy, or have a policy changed.

Most of these WSIB policies are developed in secret, are implemented by retroactive decree, and serve best the interests of the bureaucrats and the 10% of the employer community which has the economic weight to get the Board to listen to them.

**The *Fink and Associates* Workers' Compensation Newsletter** is published 3 times a year by **Richard Fink,** 466 Dupont Street, Toronto, Ontario. M5R 1W6.

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